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Supreme Court, U.S.
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No. 00-1126

In The

Supreme Court of the United States

MICHAEL A. SCOTT,

Petitioner,

versus

NORFOLK SOUTHERN CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fourth Circuit Court of Appeals erred in dismissing Scott's appeal for failure to post an appeal bond.

II. Whether the District Court abused its discretion in not remanding and the dismissing *Scott XI* and *Scott XIII*.

CORPORATE DISCLOSURE OF NORFOLK SOUTHERN CORPORATION REQUIRED BY RULE 29.6

Norfolk Southern Corporation is a publicly held corporation, incorporated in the Commonwealth of Virginia, having no parent corporations. No other publicly held corporation owns 10% or more of the stock of Norfolk Southern Corporation, and there is no other publicly held corporation that has a direct financial interest in the outcome of this litigation.

The following is a list of Norfolk Southern Corporation's wholly owned subsidiaries and their state of incorporation:

	STATE OF INC.
Agency Media Services, Inc.	Indiana
Atlantic Acquisition Corporation	Pennsylvania
Atlantic Investment Company	Delaware
Norfolk Southern Properties	Virginia
Norfolk Southern Railway Company	Virginia
North American Van Lines, Inc.	Delaware
NS Crown Services, Inc.	Virginia
NS Fiber Optics, Inc.	Virginia
NS Transportation Brokerage Corporation	Virginia
Pocahontas Development Corporation	Kentucky
Pocahontas Land Corporation	Virginia
TCS Leasing, Inc.	Oklahoma

Norfolk Southern Railway Company Subsidiaries

Airforce Pipeline, Inc.	North Carolina
Alabama Great Southern Railroad Company, The	Alabama

CORPORATE DISCLOSURE OF NORFOLK SOUTHERN CORPORATION REQUIRED BY RULE 29.6 – Continued

Atlantic and East Carolina Railway Company	North Carolina
Camp Lejune Railroad Company	North Carolina
Central of Georgia Railroad Company	Georgia
Chesapeake Western Railway	Virginia
Cincinnati, New Orleans and Texas Pacific Railway Company, The	Ohio
Citico Realty Company	Virginia
Georgia Southern and Florida Railway Company	Georgia
High Point, Randleman, Asheboro and Southern Railroad Company	North Carolina
Interstate Railroad Company	Virginia
Lamberts Point Barge Company, Inc.	Virginia
Memphis and Charleston Railway Company	Mississippi
Mobile and Birmingham Railroad Company	Alabama
Norfolk and Portsmouth Belt Line Railroad Company	Virginia
Norfolk and Western Railway Company	Virginia
North Carolina Midland Railroad Company, The	North Carolina
Rail Investment Company	Delaware
Shenandoah-Virginia Corporation	Virginia
South Western Railroad Company, The	Georgia
Southern Rail Terminals, Inc.	Georgia
Southern Rail Terminals of North Carolina, Inc.	North Carolina
Southern Region Coal Transport, Inc.	Alabama
Southern Region Materials Supply, Inc.	Georgia

CORPORATE DISCLOSURE OF NORFOLK SOUTHERN CORPORATION REQUIRED BY RULE 29.6 – Continued

Southern Region Motor Transport, Inc.	Georgia
State University Railroad Company	North Carolina
Tennessee, Alabama & Georgia Railway Company	Delaware
Tennessee Railway Company	Tennessee
Virginia and Southwestern Railway Company	Virginia
Yadkin Railroad Company	North Carolina

Norfolk Southern Properties, Inc. Subsidiaries:

Alexandria-Southern Properties, Inc.	Virginia
Arrowood-Southern Company	North Carolina
Arrowood-Southern Executive Park, Inc.	North Carolina
Carlyle CA Corporation	Virginia
Carlyle Development Corporation	Virginia
Charlotte-Southern Corporation	North Carolina
Charlotte-Southern Hotel Corporation	North Carolina
Lambert's Point Docks, Incorporated	Virginia
NKPI Management, Inc.	Indiana
Nickle Plate Improvement Company, Inc., The	Indiana
Norfolk Southern Industrial Development Corp.	Virginia
NS-Charlotte Tower Corporation	North Carolina
NS Gas Properties, Inc.	Virginia
NS Gas Properties, II, Inc.	Virginia
Sandusky Dock Corporation	Virginia
Southern Region Industrial Realty, Inc.	Georgia
Virginia Holding Corporation	Virginia

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Norfolk Southern Corporation, *et al.*, provide this Brief in Opposition to Michael A. Scott's Petition for Writ of Certiorari.

STATEMENT OF THE CASES

Respondents provide the following Statement Of The Cases[1] pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, due to perceived misstatements of fact and law in the Petition that bear on what issues would properly be before the Court if certiorari were granted.

A full understanding of the Fourth Circuit's dismissal of the appeal cannot be achieved without setting forth the history of Petitioner's litigation against Norfolk Southern Corporation and numerous of its officers and employees, and against the attorneys who represented Norfolk Southern Corporation and its officers and employees.[2] That litigation began in early 1995, and Scott

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[1] Scott petitions from a consolidated appeal of two cases in the Fourth Circuit, Record Nos. 00-1516 and 00-1576. These cases have been known as *Scott XI* and *Scott XIII*, respectively. *See* Respondents' Appendix 1-7 (hereinafter "Resp. App. ___").

[2] Indeed, the District Court recognized this position in its opinions and orders dismissing each of the cases. Resp. App. 20-30, 45-55. Petitioner asserts otherwise. Pet. at 7.

filed the last case in October, 1999. Respondents' Appendix A sets forth Petitioner's litigation history, including his appeals to the Fourth Circuit and one previous Petition for Writ of Certiorari (Case No. 98-1138). Resp. App. 1-7.

Petitioner requests this Court to review his cases in a vacuum. As the Eastern District of Virginia set forth in its opinions dismissing the two cases, no such vacuum exists. Significantly, Petitioner failed to include those District Court's opinions and orders in his Appendix. Respondents therefore include the *Scott XI* and *Scott XIII* District Court opinions. *See* Resp. App. 10-18, 19-35.

Scott XI

Petitioner filed *Scott XI* in the Norfolk Circuit Court on February 17, 1999. Respondents removed the case to Federal Court on March 8, 1999. Count 3 of the removed Motion for Judgment specifically alleged a claim under 42 U.S.C. § 1981: race discrimination in procuring and complying with certain releases in *Scott III, IV, VI and VII*. The § 1981 claim created federal question jurisdiction under 28 U.S.C. § 1331. Counts 1 and 2 of that removed Motion for Judgment alleged fraud in procuring those same releases and dismissals in *Scott III, IV, VI and VII* and breach of contract based on the *Scott III, IV, VI and VII* releases. *See* Pet. App. E, 13-18.[3] Even a cursory reading of Count 3 of the *Scott XI* removed Complaint shows that it directly relates to the claims alleged in Counts I and II of the removed Complaint. Pet. App. 18.

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[3] References to Petitioner's Appendix are "Pet. App. ___."

Scott XIII

Petitioner's statements describing *Scott XIII* overlook the language of his removed Complaint. While couching his claims as purported state law claims, he made the following specific allegations:

- Scott was subjected to "unwanted attention" in the form of "unlawful discrimination, sexual harassment and retaliation in the workplace" by the individual defendants in violation of specific guarantees set forth in the written contract. (Removed Complaint, ¶ 6, Pet. App. 26).

- The individual defendants subjected Scott to racial harassment and retaliation in the form of abusive and hostile racial language . . . ; racial harassment and retaliation in the form of isolation by peers in the workplace; racial harassment and retaliation in the form of increased workload and threats of bodily harm . . . ; racial harassment and discrimination in the form of an assault and battery; sexual harassment in the form of repeated unwanted physical contact in the workplace by male coworkers; sexual harassment in the form of abusive and hostile homosexual language in the workplace by male coworkers; retaliation in the form of harassment and increased workload; retaliation in the form of abolishing Scott's mechanic performance position at NS' coal loading facility in Norfolk and transferring the position to Decatur, Illinois; retaliation and racial discrimination in the form of terminating Scott's employment. . . . (Removed Complaint, ¶ 6, Pet. App. 26.)

Scott misstates that these were contract claims based upon Norfolk Southern's equal employment opportunity policies promulgated by various chief executive officers. They have their source in Title VII of the United States Code, 42 U.S.C. § 2000e *et seq.* and in other civil rights laws, including, but not limited to, 42 U.S.C. § 1981. Scott further omits that all of these claims had previously been litigated by him. *See* Resp. App. 1-7. *Scott XIII* was a veiled attempt to relitigate all of those claims under the guise of contract breach. Nevertheless, he invoked the federal laws covering race and sex discrimination and harassment, thereby permitting the removal to the Eastern District of Virginia. Moreover, the other claims pled in *Scott XIII* relate, *inter alia*, directly to what occurred in *Scott III, IV, VI* and *VII* in obtaining the releases and dismissals of those cases, which necessarily ties back to *Scott XI, supra.*

Scott XI Dismissal

Petitioner in both his Statement Of The Case and his Argument carefully avoids any discussion of the District Court's opinions and orders denying remand of his case to the state court and then dismissing it. Significantly, he fails to include either of the *Scott XI* pertinent opinions in his Appendix. *See* Resp. App. 10-18, 19-35, 36-37.

Petitioner filed *Scott XI* and the Respondents removed the case to Federal District Court on the basis of the Court's original jurisdiction over the § 1981 claim. Scott moved to remand the case, and thereafter the Respondents moved to dismiss and for summary judgment.

In its Order denying remand, the District Court analyzed Scott's removed Complaint and concluded that his § 1981 claim was "so related to his state law fraud and breach of contract claims as to form part of the same 'case or controversy'." Resp. App. 13. The District Court further found: "Scott alleges and incorporates the same facts with regard to his federal claim as he does with regard to his state claims." *Id.* at 13-14. The Court then exercised supplemental jurisdiction over Scott's state law claims. Following that finding, the Court analyzed the removed Complaint and declined to exercise its discretion to remand the state law claims. *Id.* at 14. In that same Order, the Court held that it had insufficient evidence at that time to determine the Motion to Dismiss and for Summary Judgment; therefore, it took the Respondents' Motions under advisement. Resp. App. 17.

Respondents filed a Supplemental Evidentiary Submission and a Supplemental Brief in Support of their Motion to Dismiss and for Summary Judgment. The District Court granted the Respondents' Motions to Dismiss, which Scott omitted from his Appendix. Resp. App. 19-35. In that Opinion and Order, the District Court analyzed the nature of the *Scott XI* removed Complaint and found that his "attempt to relitigate these issues constitutes frivolous and vexatious litigation." Resp. App. 31. Moreover, the similarity between Scott's prior federal pleadings and his state court (removed) Motion for Judgment led the District Court to conclude that Scott instituted the *Scott XI* litigation in state court "for the purposes of evading this Court's prefiling injunction." Resp. App. 31. The District Court also dismissed Scott's case on the basis of claim preclusion. Concluding, the

District Court stated "because of the frivolous and vexatious nature of *Scott XI* and because claim preclusion bars Scott from reasserting these claims, the Court dismisses *Scott XI*." Resp. App. 33. Thus, in *Scott XI*, the Court considered and rejected Scott's motion to remand, asserting its *discretionary* supplemental jurisdiction over the state law claims combined with the removable federal claim. Though omitted by Petitioner, the District Court's opinions and orders control the disposition of *Scott XI*, and Respondents include them, Resp. App. 10-35, to correct Petitioner's deliberate misstatement of fact in his Petition.

Scott XIII Dismissal

Petitioner filed *Scott XIII* in the Circuit Court for the City of Virginia Beach; Respondents timely removed the case to Federal Court; on November 8, 1999, Petitioner moved to remand the case. As with *Scott XI*, Petitioner omitted any discussion of the District Court's ruling dismissing his removed *Scott XIII* Complaint. *See* Resp. App. 40-65.

The District Court analyzed the allegations in *Scott XIII*, which, in turn, led to the District Court discussing the *Scott* litigation procedural and factual background: "Much of the factual background of *Scott XIII* is the history of Scott litigation. Both the Plaintiff and the Defendants have raised issues that depend on familiarity with this history. Accordingly, the Court briefly sets forth, at the risk of oversimplifying these matters, a recapitulation of Scott's cases against the Norfolk Southern Defendants." Resp. App. 45.

Following its review of the entangled history of Petitioner's litigation, the District Court analyzed its jurisdiction over the removed Complaint and Scott's Motion to Remand. The Court concluded:

> The allegations in *Scott XIII* involved, for the most part, the same parties, the same alleged defenses, and the same time periods as did *Scott IV*, *Scott VI*, *Scott IX* and *Scott XI*. Even Scott's claims arising from Defendants' new conduct, the presentation of evidence during Scott's contempt hearing in this Court [*Scott X*], are part of the same series of transactions or events giving rise to prior litigation. Moreover, it is clear . . . that Scott filed this action in state court in an effort to avoid the prefiling injunction that this Court has imposed against him.

Resp. App. 58. The District Court therefore concluded that it had jurisdiction over the action and, for the above stated reasons, denied Petitioner's Motion to Remand.

Having denied the Motion to Remand, the Court then considered all of the claims under the claim preclusion doctrine and concluded that all of Scott's claims with regard to the release agreements were barred by claim preclusion because he had a full and fair opportunity to litigate the matters in *Scott IV*, *Scott VI*, *Scott IX* and *Scott XI*. Resp. App. 59-62. The Court also found that his claims with respect to efforts at collecting court imposed sanctions were barred because Petitioner had a full and fair opportunity to litigate those matters in *Scott X*. *Id.* As to the Defendants' participation in and presentation of evidence during the *Scott X* contempt hearing, the Court found that the Petitioner had failed to state a claim upon which relief could be granted and that he had filed that

claim in bad faith for the sole purpose of harassing the Defendants. Resp. App. 62. Finally, the District Court found that Petitioner's *Scott XIII* lawsuit in state court "was an attempt to avoid the court's prefiling injunction and an attempt to avoid the preclusive effect of litigation in this court." The Court stated: "Scott accuses the Defendants of malicious abuse of legal process. Clearly it is Scott who is abusing the legal process." *Id.* at 63. Though omitted by Petitioner, the District Court's Order of Dismissal controls the disposition of this case, and Respondents include it, Resp. App. 40-65, to correct Petitioner's deliberate misstatement of fact.

SUMMARY OF THE ARGUMENT

1. The Fourth Circuit did not err in dismissing Scott's appeal for failure to post the appeal bond.

2. The District Court did not err in assuming jurisdiction over all of Petitioner's claims in *Scott XI*.

3. The District Court did not err in assuming jurisdiction over all of Petitioner's claims in *Scott XIII*.

ARGUMENT

Respondents believe that Scott's Petition for Writ of Certiorari is not well grounded in fact or in law. Respondents submit three bases for this assertion.

I. THE FOURTH CIRCUIT DID NOT ERR IN DISMISSING SCOTT'S APPEAL FOR FAILURE TO POST THE APPEAL BOND.

Scott's Petition does not attack the Fourth Circuit's dismissal of his appeals in *Scott XI* and *Scott XIII* for failure to post the court-ordered appeal bonds. Rather, Petitioner apparently argues that because the District Court lacked jurisdiction over the claims, therefore the Fourth Circuit lacked jurisdiction and could not even consider the appeal bond issue. Because Petitioner is not substantively attacking either the Fourth Circuit's Order of Consolidation or its subsequent Dismissal Order, they must stand. Moreover, Petitioner nowhere challenges the District Court's discretion in ordering the bonds. Notwithstanding, sufficient factual and legal authority exists to support the Fourth Circuit's dismissal.

By Order dated May 4, 2000, the District Court in *Scott XI* ordered Scott to file a bond in the amount of $1,000, pursuant to Rule 7 of the Federal Rules of Appellate Procedure. Resp. App. 38-39. By Order dated May 18, 2000, the District Court in *Scott XIII* ordered Scott to file a bond in the amount of $1,000, pursuant to Rule 7 of the Federal Rules of Appellate Procedure. Resp. App. 67-68. By Order dated June 26, 2000, the District Court ordered Scott to post the bond within thirty days. Resp. App. 69. Scott never posted either of the required bonds.

In a similar case, with a similarly "litigious pro se" plaintiff, the First Circuit affirmed an order requiring an appeal bond. *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987). The First Circuit noted that:

> Though the district court did not make a finding that the appeal on the merits was frivolous, we note that defendants' motion below requesting a bond sought "security for the costs, including attorney's fees, which may be awarded by the United States Court of Appeals for the First Circuit to defendants pursuant to Fed.R.App.P. 38 and 39." Thus, the district court's decision to set the amount at $5,000 **implied a view that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was likely. . . . We note, also, that defendants introduced evidence below that plaintiff is a litigious *pro se* who has filed numerous lawsuits in state court.**

Id. (Emphasis supplied). In these cases, as in previous *Scott* cases, the District Court found that Petitioner was a litigious *pro se* plaintiff who had ignored the District Court's admonitions against the filing of frivolous claims. Resp. App. 33-34, 63. As in *Sckolnick*, the District Court ordered appeal bonds based upon the Respondents' concerns with the frivolity of the appeal. Under the same facts, the First Circuit dismissed the appeal for failure to post the appeal bond. *Sckolnick, supra*, 820 F.2d at 15. If Scott's failure to pay the appeal bonds goes uncorrected, the Rule 7 Bond Orders will have served no purpose. Failure to sanction Scott with dismissal effectively removes the discretion given the District Court by Rule 7.

Other circuits have approved dismissal for failing to file an appeal bond. *Perry v. Pogemiller*, 16 F.3d 138, 139 n.1 (7th Cir. 1993); *Fed. Prescription Serv. v. Amer. Pharm. Assn.*, 636 F.2d 755, 757 n.2 (D.C. Cir. 1980). The Fourth Circuit dismissed two of Scott's previous appeals for failure to post the appeal bond (*Scott IX, X*, Nos. 98-2661;

98-2664, respectively). Dismissal was particularly appropriate in the instant cases, *Scott XI* and *Scott XIII*, where Scott failed to pay sanctions ordered by the District Court in the past, sought to manipulate the Court's jurisdiction by filing identical and previously adjudicated claims in state court, and prosecuted frivolous, vexatious, harassing, and previously adjudicated claims. The requirement of an appeal bond is supported by the Federal Rules of Appellate Procedure, and case law supports dismissal of the appeal. Given Petitioner's resources[4] to continue prosecuting baseless litigation in the state and federal courts, an inference exists that he was unwilling to "put his money where his mouth is" and post the $1,000 appeal bonds. No wonder that Petitioner does not attack the Fourth Circuit's dismissal for failure to post the appeal bond. Now, Scott's Petition is merely a ruse to continue his unreigned free ride through the federal judicial system. That free ride must end.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN NOT REMANDING AND THEN DISMISSING *SCOTT XI*.

Petitioner rests his entire case upon an assertion that the District Court did not have jurisdiction to dismiss all of the claims in *Scott XI*. That position ignores the plain

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[4] Petitioner makes no *in forma pauperis* claim, and he cannot: he owns rental property in Virginia Beach, and he has obtained settlements and judgments from Norfolk Southern Corporation since 1992 in a total amount exceeding $180,000.00.

language of the removal statutes, the equally plain language of Scott's removed Motion for Judgment, and the District Court's discretion in deciding all of the claims.

Respondents had the right to remove *Scott XI* under 42 U.S.C. § 1441(b). Count 3 of the removed Complaint, based on 42 U.S.C. § 1981, arises under the "laws of the United States. . . . " 42 U.S.C. § 1441(b). Petitioner cannot seriously assert that the District Court did not have proper federal question jurisdiction under 28 U.S.C. § 1331. Petitioner cannot argue that Count 3, which specifies its "arising under" 42 U.S.C. § 1981, is not "a separate and independent claim or cause of action within the jurisdiction conferred by § 1331 of [Title 28]." 28 U.S.C. § 1441(c). Under § 1441(c), since one removable claim was paired with two or more otherwise arguably nonremovable claims (the state law claims in Counts 1 and 2), the case could be removed. Thereafter, the District Court has discretion whether it may determine all the issues therein. Notwithstanding Petitioner's protestations, the District Court's actions are reviewed on an abuse of discretion standard.

Intoning the Constitutional mantras of "Article III case or controversy," limited jurisdiction of the federal courts, pendent jurisdiction, supplemental jurisdiction, Petitioner nevertheless fails to demonstrate that the District Court abused its discretion in deciding all of the issues in each of the removed cases. Moreover, he does not challenge the decisions to dismiss *Scott XI* or *Scott XIII*; rather, he seems to be challenging the jurisdiction of the Court to make those decisions.

That jurisdiction is amply demonstrated in *Scott XI* by the presence of the § 1981 claim in Count 3 of the removed Motion for Judgment, a point Petitioner concedes. Pet. for Cert. 12. *See Pierotti v. 777 N. White Station Road*, 937 F. Supp. 1296 (W.D. Tenn. 1996). Accordingly, Respondents were entitled, under 28 U.S.C. § 1441(b), to remove this action to Federal Court. *See Williams v. Huron Valley Sch. Dist.*, 858 F. Supp. 97 (E.D. Mich. 1994); *Kabealo v. Davis*, 829 F. Supp. 923 (S.D. Ohio 1993), *aff'd*, 72 F.3d 129 (Table) (6th Cir. 1995). The District Court thereafter acquired supplemental jurisdiction over Scott's state law claims pursuant to 28 U.S.C. § 1367(a). *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).[5]

Scott's pleading makes clear that all claims derive from a single set of alleged facts. Count 3 of the removed Complaint, in which he asserts the § 1981 claim, alleges no facts. Rather, it incorporates the facts alleged in Counts 1 and 2, all state law causes of action. The state law claims derive from a nucleus of operative facts identical in every aspect to the § 1981 claim, over which the District Court had original jurisdiction. Accordingly, the District Court had the power to exercise supplemental jurisdiction over all of Scott's state law claims under 28 U.S.C. § 1367(a).

Scott now asserts error by the District Court in not remanding *Scott XI* to Norfolk Circuit Court under 28 U.S.C. § 1441(c) and 28 U.S.C. § 1367(c).[6] He asserts that

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[5] The concept of supplemental jurisdiction enunciated in *Gibbs* is codified in 28 U.S.C. § 1367. *Smith v. K-Mart Corp.*, 899 F. Supp. 503 (E.D. Wash. 1995).

[6] In addition, Scott argues that removal is improper because his § 1981 claim is not separate and independent from

the § 1981 claim is not separate and independent from his state law claims. As noted above, Scott's claims, under both state and federal law, arise entirely from a common nucleus of operative facts and therefore fall within this Court's original and supplemental jurisdiction.

Because all of Scott's *Scott XI* claims derive from precisely the same alleged facts, he cannot rely upon Section 1441(c) as the basis for remand. *See Buchner v. Federal Deposit Ins. Corp.*, 981 F.2d 816, 820 (5th Cir. 1993); *McGilvray v. Hallmark Fin. Group, Inc.*, 891 F. Supp. 265 (E.D. Va. 1995). Accordingly, Section 1441(c) did not provide a basis for remand in *Scott XI*.

Scott's reliance on 28 U.S.C. § 1367(c) is also misplaced. The District Court is without discretion to remand a properly removed federal claim under Section 1367(c), and therefore cannot remand Scott's Section 1981 claim. *In re City of Mobile*, 75 F.3d 605 (11th Cir. 1996). *See also Hunter by Conyer v. Estate of Baecher*, 905 F. Supp. 341, 344 (E.D. Va. 1995) ("[A]ny reasonable construction of Section 1367 forecloses the option under that statute of remanding properly removed federal claims."). Accordingly, the District Court had discretion only to remand Scott's state law claims over which it has supplemental jurisdiction.

Such discretion, however, is controlled by the mandates of 28 U.S.C. § 1367(c), the language of which is discretionary: "Use of that discretion should be exercised

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his state law claims. He ignores, however, that defendants removed this case pursuant to 42 U.S.C. § 1441(b), and that this Court has jurisdiction over his state law claims under 28 U.S.C. § 1367(a).

by principles supporting the existence of supplemental jurisdiction." *Hunter by Conyer, supra*, 905 F. Supp. at 343. Supplemental jurisdiction is "justified by considerations of judicial economy, convenience and fairness to the litigants." *Aldinger v. Howard*, 427 U.S. 1, 14 (1976); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). Even if Petitioner could establish one or more of the elements of § 1367(c), the District Court still did not commit error in asserting supplemental jurisdiction in accordance with the principles of judicial economy and fairness. *See Executive Software N. Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1552 (9th Cir. 1994). "There is one set of operative facts and one victim seeking damages. It is obvious that splitting this action between two jurisdictions will result in repetition of efforts between the state court and this Court. This consideration weighs strongly against remanding the state claims." *Hunter by Conyer, supra*, 905 F. Supp. at 345.

Judicial economy and fairness weighed heavily against remand of the state claims. If the District Court had exercised its discretion to remand Scott's state law claims, the *Scott XI* body of litigation would have followed parallel tracks in two jurisdictions, most assuredly instigating duplication of effort and waste of resources. Moreover, the case arose from alleged conduct entirely related to previous litigation Scott initiated in the Federal District Court, Resp. App. 20-30, and that connection alone suggests that he should reasonably have expected removal.

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 357 (1998), this Court stated:

> A district court can consider whether plaintiff engaged in any manipulative tactics when it decides whether to remand a case. If the plaintiff has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors to be considered under the pendent jurisdiction doctrine support a remand of the case.

Scott has a long history of litigation against Norfolk Southern Corporation and a core group of its officers, employees and agents. Resp. App. 1-7. The District Court has determined on more than one occasion that litigation to be abusive, and ordered Scott to obtain leave of Court before serving any of these Respondents with new lawsuits. But for this injunctive measure, Scott assuredly would have brought *Scott XI* in Federal court. The instant case treads over well-worn ground, and his selection of a state court forum was a transparent attempt to circumvent the District Court's injunction and prior rulings. Such manipulation should be taken into account in determining that the District Court did not abuse its discretion in not remanding the case.

III. THE DISTRICT COURT DID NOT ERR IN NOT REMANDING AND THEN DISMISSING *SCOTT XIII*.

Petitioner complained in *Scott XIII* of a variety of matters:

- Racial and sexual harassment, discrimination, and retaliation, all breaching alleged contracts of employment and resulting tortious interference with contracts;

- Unlawful discrimination, sexual harassment, racial harassment and retaliation;
- Fraud in pleading release and *res judicata* in *Scott IX;*
- Breach of contract based on the *Scott III, IV, VI and VII* releases;
- Fraudulent inducement and actual or constructive fraud in obtaining the *Scott III, IV, VI and VII* releases;
- Actual and constructive fraud and misrepresentation, malicious abuse of process, malicious prosecution and breach of Virginia's due process clause in conducting debtor's interrogatories based upon sanctions judgments;
- Defamation, malicious abuse of process, malicious prosecution in participating in the *Scott X* criminal contempt hearings.[7]

Pet. App. 21-40. *Scott XIII* contains allegations founded on a "claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b). The various breach of contract claims, articulated in paragraphs 4 through 13 of the removed *Scott XIII* Complaint (Pet. App. 25-28) are all tied to "unlawful discrimination, sexual harassment and retaliation in the workplace." *See* Par. 6, 7, 12, 13, Pet. App. 26, 28. More specifically, Scott alleged:

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[7] All of the allegations relate back to Petitioner's prior litigation, all of which contained multiple allegations of racial discrimination and racial and sexual harassment, all of which stated federal question claims under 28 U.S.C. § 1331.

> The individual defendants subjected Scott to racial harassment and retaliation in the form of abusive and hostile racial language using words such as nigger and reggin rail (liar nigger when lettering is reversed); racial harassment and retaliation in the form of isolation by peers in the workplace; racial harassment and retaliation in the form of increased workload and threats of bodily harm by defendants Clemmer, Henley and Moore; racial harassment and discrimination in the form of an assault and battery by defendant Catron on February 15, 1996; sexual harassment in the form of repeated unwanted physical contact in the workplace by male coworkers; sexual harassment in the form of abusive and hostile homosexual language in the workplace by male coworkers; retaliation in the form of harassment and increased workload; retaliation in the form of abolishing Scott's mechanical foreman's position at NS' coal loading facility in Norfolk and transferring the position to Decatur, Illinois on February 16, 1996; and retaliation and racial discrimination in the form of terminating Scott's employment on February 16, 1996.

Pet. App. 26. Those allegations all have their origin in Title VII, 42 U.S.C. § 2000e *et seq.* *See also*, Par. 12, 13, Pet. App. 28. Without Title VII, the alleged contracts, which are nothing more than Norfolk Southern's statements of commitment to enforcing those laws, are meaningless.[8] These discrimination-law-based allegations constitute a federal question under 28 U.S.C. § 1331. Therefore the

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[8] All of the allegations of racial and sexual harassment and discrimination were heard and rejected by a jury in *Scott V.*

case was removable to the District Court, and the District Court had the discretion to decide all of the matters in the case.

Unlike Petitioner, the District Court recognized that *Scott XIII* did not exist in a vacuum; the District Court analyzed extensively the procedural and factual background of the *Scott* litigation:

> Much of the factual background of *Scott XIII* is the history of Scott litigation. [The parties] have raised issues that depend on familiarity with this history. Accordingly, the Court briefly sets forth, at the risk of over simplifying these matters, a recapitulation of Scott's cases against the Norfolk Southern defendants.

Resp. App. 45. That history demonstrated a close tie to all of Scott's Federal Court litigation, making removal proper.

Upon removal, "the federal court acquires complete and exclusive jurisdiction." Resp. App. 56; *French v. Hay*, 89 U.S. (22 Wall.) 238 (1874).

> [I]n treating litigation where nonfederal questions or claims were bound up with the federal claims upon which the parties were already in Federal Court, this Court has found nothing in Art. III's grant of judicial power which prevented adjudication of the nonfederal portions of the parties' dispute.

Aldinger v. Howard, 427 U.S. 1, 9 (1976). Therefore, the District Court had the discretion to decide all of the issues in the case. *United Mine Workers v. Gibbs*, 383 U.S. 727, 728 (1966).

Relying upon *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the District Court reviewed the Complaint to determine whether Mr. Scott had attempted to avoid removal jurisdiction by artfully casting his federal claims as state law claims. *Moitie*, 452 U.S. at 397 n.2. In *Moitie*, while the state court actions appeared to raise only state law claims, the allegations involved the same parties, the same alleged defenses and the same time periods as claims previously dismissed in District Court. Similarly, the District Court found in *Scott XIII* that the allegations "involve[d], for the most part, the same parties, the same alleged defenses, and the same time periods as did *Scott IV, Scott VI, Scott IX and Scott XI.*" Resp. App. 58. The District Court further observed that "even Scott's claims arising from defendants' new conduct, the presentation of evidence during Scott's contempt hearing in [the District] Court, are part of the same series of transactions or events giving rise to prior litigation." *Id.* The Court further found that Petitioner filed *Scott XIII* in state court in an effort to avoid the prefiling injunction that the District Court had imposed against him. Resp. App. 58. On the foregoing bases, the Court asserted that it had jurisdiction over the entire action and denied Petitioner's Motion to Remand.

The District Court then further analyzed *Scott XIII* and concluded that his claims were barred by *res judicata*. Again, the Court's action is supported by *Moitie*. In *Moitie*, having found that the state law claims involve the same parties, the same alleged defenses, and the same time periods as the previously dismissed federal claims, the *Moitie* District Court dismissed the claims on grounds

of *res judicata*. This Court affirmed both the removal and dismissal on *res judicata* grounds. *Moitie*, 452 U.S. at 401.

The District Court found that Scott's claims concerning the alleged employment contracts were barred by claim preclusion, as Petitioner had a full and fair opportunity to litigate the matters in *Scott V*, *Scott VI*, and *Scott IX*; the Court found that Scott's claims with regard to the release agreements were barred by claim preclusion as having been fully and fairly litigated in *Scott IV*, *Scott VI*, *Scott IX*, and *Scott XI*; the Court found that Scott's claims with respect to preliminary efforts to collect court imposed sanctions were also barred as having been fully and fairly litigated in *Scott X*, as well as in state court. Scott asserts no error in these substantive findings, and none exists. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

Finally, the District Court considered Scott's alleged new claim based upon presentation of evidence during Scott's contempt hearing. Petitioner does not challenge the Court's conclusion that Scott failed to state a claim upon which relief can be granted. Moreover, the District Court found that Scott added that claim in bad faith and for the sole purpose of harassing the Defendants and concluded that *Scott XIII* constituted frivolous and vexatious litigation. Scott also does not challenge that conclusion.

All of the matters alleged in *Scott XIII* are intimately intertwined and entangled with Scott's previous Federal Court litigation. The District Court did not abuse its discretion in assuming supplemental jurisdiction over what are purportedly only state law claims and then

deciding all of the issues. The power to decide all of the issues was conferred by Congress in 28 U.S.C. § 1441(c).

Since the District Court did not abuse its discretion in deciding all of the issues in *Scott XI* and *Scott XIII*, then the Fourth Circuit's decision to dismiss Scott's consolidated appeal for failure to post the court-ordered appeal bonds stands unchallenged.

CONCLUSION

The District Court, and therefore the Fourth Circuit, properly had jurisdiction over both *Scott XI* and *Scott XIII* and, under the discretion conferred by 28 U.S.C. § 1441(c), had jurisdiction to decide all of the issues in each case. The District Court did not abuse its discretion in doing so. Petitioner does not substantively challenge the District Court's orders requiring the appeal bonds. Scott does not assert and the record does not demonstrate that the Fourth Circuit erred in consolidating his *Scott XI* and *Scott XIII* appeals and then dismissing them for failure to post the required appeal bonds. Scott's litigation history before the District Court, the Fourth Circuit Court of Appeals, and now this Court demonstrate an ongoing pattern of vexatious and harassing litigation against Norfolk Southern Corporation, its officers and employees, and the attorneys who represented it.

Petitioner has failed to demonstrate that the Fourth Circuit's decision conflicts with another circuit court's decision on the question of dismissal for failure to post the court-ordered appeal bond. Sup. Ct. R. 10(a). Indeed, the Fourth Circuit has not "so far departed from the

accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . . ". Sup. Ct. R. 10.

Similarly, the Fourth Circuit's dismissal decision for failure to post the appeal bond has not "decided an important federal question in a way that conflicts with relevant decisions of this Court." The Fourth Circuit essentially affirmed the District Court's reliance upon established precedence of this Court, including *Moitie*.

For the foregoing reasons, Respondents respectfully ask this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Case No. : 00-1126

In The

Supreme Court of the United States

MICHAEL A. SCOTT

Petitioner,

versus

NORFOLK SOUTHERN CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENTS' APPENDIX A

SCOTT LITIGATION HISTORY

Scott I and II

Scott filed *Scott I* in March 1995, (E.D. Va. Civil Action No. 2:95cv377), alleging breach of contract (based on Title VII), assault and battery, and intentional infliction of emotional distress, all based on allegations of same-gender sexual harassment. (The case was filed in state court, and defendants removed to federal court.) Scott attempted to file a *pro se* Title VII action based on his complaints of same-gender sexual harassment. That Complaint was voluntarily dismissed, and Scott's counsel subsequently filed *Scott II* (E.D. Va. Civil Action No. 2:95cv815). *Scott II* alleged a Title VII claim based on Scott's allegations of same-gender sexual harassment. The court consolidated *Scott I* and *Scott II;* Scott's Title VII claim was dismissed; certain other claims were also dismissed; the remaining claims were tried in December 1995. While most claims were dismissed, Scott ultimately recovered a $50,000.00 judgment, joint and several, against a former NS employee and NS on a claim of common law battery. That judgment was satisfied. Scott was represented by counsel in *Scott I* and *Scott II.* Scott acted *pro se* in all cases following *Scott I/II.*

Scott III

In *Scott III* (E.D. Va. Civil Action No. 2:95cv1163) (including two motions to amend), Scott made a *pro se* claim against NS and four supervisors under the Federal Employers' Liability Act, based upon the same facts

alleged in *Scott I/II*. Summary judgment was granted for NS based upon *res judicata*. *See Scott VII, supra*.

Scott IV

In *Scott IV* (Norfolk Circuit Court, At Law No. L96-392) (three motions to amend), Scott sued both NS and its *Scott I/II* trial counsel, as well as the firm and counsel representing the former NS employee in *Scott I/II*, alleging that the defense in that case was racially discriminatory and malicious. The court sustained defendants' demurrers, and Scott noted an appeal to the Virginia Supreme Court. The appeal was withdrawn as part of a settlement of *Scott III, IV, VI, and VII*. *See Scott VII, supra*.

Scott V

In *Scott V* (E.D. Va. Civil Action No. 2:96cv257) (five motions to amend), Scott brought a variety of claims based upon his February 16, 1996, termination by NS, complaining about, *inter alia*, racial harassment and discrimination, wrongful discharge, retaliation, a FELA personal injury, an assault and battery, and emotional distress. After numerous amendments and a variety of dismissal and summary judgment orders, *Scott V* was tried to a jury verdict in April 1997, before the Honorable Henry Coke Morgan, Jr. All discrimination, harassment, and retaliation claims were either dismissed by the District Court or submitted to the jury, which returned a defense verdict on those claims. Scott recovered $4998.00 on the Federal Employers' Liability Act unwitnessed slip and fall personal injury claim; this judgment was satisfied. Scott appealed *Scott V*. The Fourth Circuit affirmed the judgment in part and vacated in part. (Record No. 97-1490). Scott's Petition for Writ of Certiorari on the

affirmance was denied. (Case No. 98-1138). On remand, the District Court granted summary judgment to defendants; the Fourth Circuit affirmed (Record No. 99-1513).

Scott VI

In *Scott VI* (E.D. Va. Civil Action No. 2:96cv610) (one motion to amend), Scott sought to raise allegations he had allegedly omitted from the *Scott V* Third Amended Complaint. *Scott VI* was stayed. *See Scott VII, supra.*

Scott VII

In *Scott VII* (E.D. Va. Civil Action No. 2:96cv699), Scott again sued NS, its counsel, and counsel for the former NS employee involved in *Scott I/II*, based on his complaints regarding the dismissal of the *Scott IV* state court case. The District Court granted all defendants' motions to dismiss *Scott VII* and imposed $2000.00 sanctions on Scott. In consideration for the sanctions award not being pursued in *Scott VII*, Scott executed releases and dismissed with prejudice *Scott III, IV,* and *VI,* and did not appeal *Scott VII.*

Scott VIII

In *Scott VIII* (E.D. Va. Civil Action No. 2:97cv522) (two motions to amend), Scott again sued NS and numerous NS employees complaining about personal classified advertisements which had appeared in the *Virginian-Pilot* newspaper in May 1997. The District Court dismissed Scott's claims against NS, thirteen individual NS employees, and co-defendant Landmark Communications. Scott was sanctioned $9143.13 for filing a frivolous action against NS and the thirteen individual NS employees. Some claims against a fourteenth individual NS employee, Jerry

W. Clemmer, were dismissed prior to trial. The court later sanctioned Scott $930.50 for filing a frivolous motion to reconsider claims against Clemmer. The court also sanctioned Scott for filing frivolous claims against Landmark Communications and imposed a pre-filing injunction on Scott. The case proceeded to trial against Clemmer, where additional claims were dismissed by the District Court, and the jury returned a defense verdict on the remaining claims. Scott appealed the District Court's rulings with respect to NS and the thirteen individual NS employees; over Clemmer's objection, Scott was granted leave to file a late appeal against Clemmer. The Fourth Circuit affirmed the summary judgments and verdicts in favor of the defendants. (Record Nos. 98-1098 and 98-2303).

Scott IX

In *Scott IX* (E.D. Va. Civil Action No. 2:97cv1134) (one motion to amend), Scott sued two NS employees, Catron and Hedgepath, who conducted surveillance of Scott at the direction of NS in February 1996, after Scott allegedly fell and was injured at an NS facility. (*See Scott V, supra*). The *Scott IX* Complaint, filed December 5, 1997, focused on that surveillance, the alleged reasons for the surveillance, and an alleged confrontation between Catron and Scott. By motion of January 10, 1998, Scott attempted to amend the *Scott IX* Complaint to add twenty-one additional defendants (including NS and numerous employees) and a variety of additional legal theories. The District Court denied the amendment by Opinion and Order of March 5, 1998. The District Court granted defendants' motion to dismiss and for summary judgment and entered a judgment order on June 30, 1998. The court

awarded Rule 11 sanctions with the amount of $5,000.00 being set by judgment order of September 2, 1998. The Fourth Circuit dismissed Scott's appeal for failure to post an appeal bond (Record No. 98-2661).

Scott X

In *Scott X* (E.D. Va. Civil Action No. 2:98cv180), filed on May 27, 1997, Scott sued NS, twenty NS employees, NS's defense counsel, Williams, Kelly & Greer ("WKG") and two of its attorneys. Asserting sixteen separate counts, he essentially claimed improprieties in preliminary efforts to collect the *Scott VIII* sanctions judgments and complaints about conversations regarding the personal classified advertisements that were the subject of *Scott VIII*. The District Court granted defendants' motion to dismiss and for summary judgment by Opinion and Order dated July 8, 1998. Scott's Fourth Circuit appeal was dismissed for failure to post the appeal bond. (Record No. 98-2664). In connection with various untimely motions to vacate and for reconsideration, the District Court imposed sanctions against Scott and expanded its pre-filing injunction to cover all filings. Nevertheless, even after the Fourth Circuit affirmed the dismissals, Scott continued to seek reconsideration by the District Court. In the Fall of 1999, the District Court, having previously found Scott in civil contempt, placed him on notice of criminal contempt. After hearings on October 1, 1999 and January 4, 2000, the District Court sentenced Scott to six months probation, ordered him to obtain employment, and ordered him to pay $100 per month toward the sanctions judgments. Scott's appeal of his criminal contempt conviction and punishment was reversed and remanded by the Fourth Circuit, by which

time the appeal was moot because the six month sentence had expired. (Record No. 00-4042).

Scott XI

In *Scott XI* (E.D. Va. Civil Action No. 2:99cv348), filed March 8, 1999, Scott sought to reopen litigation in four of his earlier lawsuits – *Scott III, IV, VI, VII* – by seeking to set aside the settlements and release agreements. *See Scott VII, supra.* The District Court dismissed Scott's claims. The Fourth Circuit dismissed Scott's appeal for failing to post the appeal bond. (Record No. 00-1516, consolidated with *Scott XIII, infra,* Record No. 00-1576).

Scott XII

In *Scott XII,* (E.D. Va. Civil Action No. 2:99cv935), filed (lodged) June 21, 1999, Scott sued NS, nineteen NS officers and employees, WKG and two of its attorneys, two Commissioners in Chancery, and two Circuit Court Clerks. He again claimed improprieties in the efforts to collect the sanctions judgments. *See Scott X.* The District Court dismissed the case; the Fourth Circuit dismissed Scott's appeal for failing to post the appeal bond. (Record No. 00-1976).

Scott XIII

In *Scott XIII* (E.D. Va. Civil Action No. 2:99cv1814), filed October 5, 1999 in Virginia Beach Circuit Court and removed on October 28, 1999, Scott asserted claims against NS, its officers, employees, Williams, Kelly & Greer and four of its attorneys or former attorneys for (1) race discrimination resulting in breach of employment contracts; (2) breach of contract concerning permanency of employment; (3) alleged improprieties in collecting

sanctions judgments; (4) alleged improprieties by defense counsel during *Scott X* contempt hearings. The District Court dismissed the case. The Fourth Circuit dismissed Scott's appeal for failing to post the appeal bond. (Record No. 00-1576, consolidated with *Scott XI, supra*, Record No. 00-1516).

RESPONDENTS' APPENDIX B

MICHAEL A. SCOTT FOURTH CIRCUIT APPEALS

RECORD NO.	CASE	DISPOSITION
97-1490	SCOTT V	Affirmed in Part, Vacated in Part, and Remanded. Scott's Petition for Writ of Certiorari (Case No. 98-1138) challenging the Fourth Circuit's affirmances was denied. On remand, District Court granted summary judgment to defendants. For subsequent appeal *see* No. 99-1513, below.
98-1098	SCOTT VIII	District Court's dismissal of some counts and judgment for defendants on jury verdicts of remaining counts affirmed.
98-2303	SCOTT VIII	Judgment for Clemmer based on jury verdict affirmed.
98-2661	SCOTT IX	Appeal dismissed for failure to post appeal bond.
98-2664	SCOTT X	Appeal dismissed for failure to post appeal bond.
99-1513	SCOTT V	Affirmed dismissal in favor of defendants on remand.
00-4042	SCOTT X	Appeal of criminal contempt judgment and sentence reversed and

		remanded, by which time the six month sentence had expired. Case dismissed as moot.
00-1516	SCOTT XI	Appeal consolidated with 00-1576 and dismissed for failure to post appeal bond. Petition for Certiorari pending (Case No. 00-1126).
00-1576	SCOTT XIII	Appeal consolidated with 00-1516 and dismissed for failure to post appeal bond. Petition for Certiorari pending (Case No. 00-1126).
00-1976	SCOTT XII	Appeal dismissed for failure to post appeal bond.

RESPONDENTS' APPENDIX C

DISTRICT COURT ORDER DENYING SCOTT'S MOTION TO REMAND IN SCOTT XI

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED
April 22, 1999

Action No.: 2:99cv348

MICHAEL A. SCOTT,
Plaintiff,

v.

NORFOLK SOUTHERN CORP., et al.

Defendants.

ORDER

On April 21, 1999, the Court conducted a hearing on the Defendants' Motion to Dismiss and/or for Summary Judgment and on the Plaintiff's Motion to Remand. The Court took the Defendants' motion under **ADVISEMENT** and **DENIED** the Plaintiff's Motion to Remand. The Court now supplements its ruling from the bench with the following written Order that sets forth in more detail the reasons for the Court's ruling.

I. Factual and Procedural History

Plaintiff Michael Scott ("Scott") originally filed this lawsuit in the Circuit Court for the City of Norfolk. This case is *Scott XI*, and it is the twelfth lawsuit filed by Scott

against his former employer, Norfolk Southern Corporation ("NS") and various of its employees and agents. This case, upon removal, became the eleventh such suit now or formerly pending in this Court. The Defendants in this case are NS, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, and Williams Kelly & Greer, P.C.

In Count One of this lawsuit, Scott alleges that the Defendants fraudulently induced him to execute release agreements and dismissal orders in *Scott III*, *Scott IV*, *Scott VI*, and *Scott VII*. He also alleges that the Defendants evinced an intent to practice actual fraud and/or constructive fraud, deceit, and/or misrepresentation when they did not carry out an oral agreement promising Scott that they would not raise any affirmative defenses in *Scott IX*, and that they would file motions with the Court withdrawing sanctions motions and "eliminate" sanctions which had been imposed. Count Two alleges that the Defendants "breached and tortiously interfered with, and conspired to breach" the release agreements. Count Three alleges that the Defendants' conduct with regard to the release agreements violated 42 U.S.C. § 1981. Scott also seeks a declaratory judgment declaring the October 1996 Settlement and Release Agreements to be invalid and void.

On March 8, 1999, Defendants petitioned for removal of the suit to this Court under 28 U.S.C. § 1441 on the

basis of the Court's original jurisdiction over the Section 1981 claim. Scott now seeks remand of this action under 28 U.S. C. § 1367(c). On March 16, 1999, Defendants filed the Motion to Dismiss and/or for Summary Judgment. Scott filed a timely response to the Motion, and on March 16, 1999, Scott filed his Motion to Remand Case to State Court. The Defendants filed a timely response to Scott's Motion.

II. Analysis

A. Motion to Remand

Scott argues that this Court should remand the case to the state court because state law predominates. According to Scott, he has alleged several claims sounding in state law and only one claim sounding in federal law. Further, Scott argues that the state law claims of fraud, breach of contract, and the claim for a declaratory judgment present more involved factual inquiries and would require more judicial resources to adjudicate than the federal claim.

The Defendants maintain that this case was properly removed, and that this Court has original jurisdiction of Scott's Section 1981 claim and supplemental jurisdiction over the state law claims. According to Defendants, Scott's state law claims are factually indistinguishable from his Section 1981 claim, and the state law claims "derive from a nucleus of operative fact identical in every aspect to the Section 1981 claim over which the Court has original jurisdiction." Further, Defendants assert that because the federal claim is not a separate and independent claim, the Court should not remand the case to the

state court. Defendants maintain that Scott's state law claims neither present novel or complex issues of state law, nor do they predominate.

28 U.S.C. § 1441(b) provides, in pertinent part:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

In the instant case, the Defendants removed the case to this Court because the Complaint alleges a cause of action under 42 U.S.C. § 1981 which is a claim "arising under" the laws of the United States. Thus, pursuant to 28 U.S.C. § 1441(b), the case was properly removed to this Court. 28 U.S.C. § 1367(a) provides:

> In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

According to the United States Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), pendent jurisdiction is justified by the considerations of judicial economy, convenience, and fairness to litigants. In the instant case, the Court **FINDS** that Scott's Section 1981 claim is so related to his state law fraud and breach of contract claims as to form part of the same "case or controversy." Scott alleges and incorporates the same facts with regard to his federal claim as he does with

regard to his state claims. Therefore, the Court will exercise supplemental jurisdiction over Scott's state law claims.

Pursuant to Section 1441(c):

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.

Thus, where state law claims are "separate and independent" from federal claims, a federal court *may* remand the state law claims. However, where an action was properly removed under 28 U.S.C. § 1441(b), this Court may not remand the federal claims presented. In the instant case, the Court could only remand Scott's state law claims if the Court found that the federal claim is a "separate and independent claim or cause of action." "Where there is a single injury to plaintiff for which relief is sought, arising from an interrelated series of events or transactions, there is no separate or independent claim or cause of action under 1441(c)." *McGilvray v. Hallmark Financial Group, Inc.*, 891 F.Supp. 265 (E.D. Va. 1995), *citing, American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). Accordingly, the Court **FINDS** that Scott's federal claim is not a separate and independent cause of action. Therefore, the Court will not exercise its discretion to remand the state law claims in this case. Scott's Motion to Remand is **DENIED**.

B. Motion to Dismiss and/or for Summary Judgment

1. *Standard of Review*

The Court will treat the Defendants' motion as a motion for summary judgment.[1] District courts may enter summary judgment only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (en banc) *cert. den.*, 498 U.S. 1109 (1991). The facts and inferences to be drawn from the pleadings must be viewed in the light most favorable to the nonmoving party. *See Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995). Summary judgment is appropriate when the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986).

In order to successfully defeat a motion for summary judgment, a plaintiff cannot rely on "mere belief or conjecture, or the allegations and denials contained in his pleadings." *Doyle v. Sentry Insur.*, 877 F.Supp. 1002, 1005 (E.D. Va. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Rather, the nonmoving party must set forth specific facts through affidavits, depositions, interrogatories or other evidence to show genuine issues for trial. *See Celotex*, 477 U.S. at 324. When a plaintiff fails to make a

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[1] Pursuant to Federal Rule of Civil Procedure 12(b), if on a motion to dismiss for failure to state a claim upon which relief can be granted, the parties present matters outside the pleadings which are not excluded by the Court, the motion shall be treated as one for summary judgment.

sufficient showing establishing an essential element of his case and the plaintiff bears the burden of proof on that issue, "there is 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other fact immaterial." *Celotex*, 477 U.S. at 322; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

2. *Defendants' Grounds for Summary Judgment*

The Defendants assert three grounds for their summary judgment motion. First, the Defendants argue that the Court should dismiss Scott's suit because Scott filed it solely for the purposes of harassing the Defendants. According to Defendants, Scott, in filing this case, "is again attempting to bring an action which this Court has already rejected." Scott maintains that this lawsuit is not intended to harass the Defendants. He states that the sole purpose of this lawsuit is to vindicate his rights.

Second, the Defendants assert that Scott's claims should be dismissed on the grounds of res judicata, claim preclusion, because they state that Scott is attempting to relitigate identical claims which were brought or which could have been brought in *Scott IX* and in Scott's motions to vacate in *Scott III* and *Scott VI*. Scott argues that his claims are not barred by res judicata because there has been no final judgment on the merits of his claims.

Finally, Defendants move the Court to dismiss Scott's suit on the basis of collateral estoppel or issue preclusion.

Defendants assert that the underlying issues in the present case were previously decided in *Scott IX*, *Scott III*, and/or *Scott VI*. Scott argues that the Court should not dismiss any of his claims on the grounds of issue preclusion, because the Court's previous determination regarding the issues he now raises were not "essential to the prior judgments." Scott further argues that dismissal of his lawsuit would deny him due process, because he has not been afforded a full and fair opportunity to litigate his claims in the previous *Scott* cases.

At this point in the litigation, the Court does not believe that it has sufficient information before it to determine whether claims in the instant case have been previously decided on their merits. Further, the Court cannot say at this point whether Scott brought this case in state court in order to circumvent this Court's prefiling injunction and to harass the Defendants. Accordingly, the Court takes the Defendants' motion under **ADVISEMENT** pending the parties' proffer of any further evidence on these issues.

III. Conclusion

For the foregoing reasons, the Court **DENIES** Scott's Motion to Remand and takes under **ADVISEMENT** the Defendants' Motion to Dismiss and/or for Summary Judgment.

The Clerk is **REQUESTED** to send copies of this Order to Scott and to all counsel of record.

It is so **ORDERED**.

/s/ Henry Coke Morgan, Jr.
United States District Judge

Norfolk, Virginia
April 22, 1999

RESPONDENTS' APPENDIX D

DISTRICT COURT ORDER GRANTING DEFENDANT'S MOTION TO DISMISS IN SCOTT XI

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED
March 27, 2000

Action No.: 2:99cv348

MICHAEL A. SCOTT, *pro se*,
Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION, *et al.*
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On March 16, 1999, the defendants filed motions for dismissal and for summary judgment. On April 21, 1999, the Court conducted a hearing on these issues but withheld ruling on the motions for dismissal and for summary judgment pending the proffer of evidence that the parties may have on the merits of the case. After reviewing the evidence, the Court grants the defendants' motion to dismiss for the following reasons.

I. Procedural and Factual Background[1]

A. Scott XI

Plaintiff Michael Scott ("Scott") originally filed this lawsuit in the Circuit Court for the City of Norfolk. This case is *Scott XI*, and it is the twelfth lawsuit filed by Scott against his former employer, Norfolk Southern Corporation ("NS") and various of its employees and agents since March 1995. This case, upon removal, became the eleventh such suit now or formerly pending in this Court. The Defendants in this case are Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, and Williams Kelly & Greer, P.C.

In Count One of this lawsuit, Scott alleges that the Defendants fraudulently induced him to execute release agreements and dismissal orders in *Scott III* (2:95cv1163), *Scott VI* (2:96cv610), and *Scott VII* (2:96cv699). He also alleges that the Defendants evinced an intent to practice actual fraud and/or constructive fraud, deceit, and/or misrepresentation when they did not carry out an oral agreement promising Scott that they would not raise any affirmative defenses in *Scott IX*, and that they would file motions with the Court withdrawing sanctions motions

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[1] The Court has construed the facts as presented here solely upon the existing record and for the limited purpose of ruling on the parties' motions.

and "eliminate" sanctions which had been imposed. Count Two alleges that the Defendants "breached and tortiously interfered with, and conspired to breach" the release agreements. Count Three alleges that the Defendants' conduct with regard to the release agreements violated 42 U.S.C. § 1981. Scott also seeks a declaratory judgment declaring the October 1996 Settlement and Release Agreements to be invalid and void.

On March 8, 1999, Defendants petitioned for removal of the suit to this Court under 28 U.S.C. § 1441 on the basis of the Court's original jurisdiction over the Section 1981 claim. On March 16, 1999, Scott moved to remand this action under 28 U.S.C. § 1367(c). Also on March 16, 1999, Defendants filed the Motion to Dismiss and/or for Summary Judgment. On April 22, 1999, the Court denied Scott's motion to remand and took under advisement defendants' motion to dismiss and motion for summary judgment.

On September 20, 1999, Scott moved to dismiss without prejudice. On November 9, 1999, Scott moved to withdraw his motion to dismiss without prejudice and also moved the Court to reconsider remanding the case to state court.

B. Scott III, VI and VII: Settlement and Release Agreements

On October 10, 1996, Michael Scott and the Norfolk Southern Defendants entered into Settlement and Release Agreements ("Agreements") in which Scott agreed to dismiss and forego "further litigation against NS and any of its officers, directors, agents, employees, or former

employees" in *Scott III* (2:95cv1163), *Scott VI* (2:96cv610), and *Scott VII* (2:96cv699). The defendants agreed to "waive and not seek sanctions against Scott for pleadings and allegations made by Scott in connection with" these cases. Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and by stipulation of the parties, the Court dismissed the cases with prejudice. Nothing in the Agreements required the defendants to file any motions with the Court to request lifting Court-imposed sanctions. On February 25, 1998, at a hearing on Scott's motion to amend *Scott IX* (2:97cv1134) to include, among other allegations, counts of fraud and tortious interference of contract with respect to these Agreements, the Court advised Scott and the defendants that "if the Court imposes sanctions, only the Court may release a party from sanctions; the sanctions may not be released by any kind of agreement between the parties." Tr. 3.

On October 26, 1998, over two years after the dismissals of *Scott III* and *Scott VI*, Scott filed motions to vacate, pursuant to Federal Rules of Civil Procedure 60(b)(6) the Court's dismissal of these cases. Scott alleged that he was defrauded by the defendants, and argued that the defendants did not honor their promise to eliminate the Court sanctions against Scott. Scott also alleged that he insisted that the Agreements include language regarding his pursuit of his *Scott IX* lawsuit, and that the failure to include such language precluded Scott from bringing suit against the railroad police agents. an oral agreement promising Scott that they would not raise any affirmative defenses in *Scott IX*.

On December 22, 1998, the Court denied Scott's motion in *Scott III* on the grounds that Scott had not

"demonstrate[d] a meritorious claim or defense." The Court further noted that Rule 60(b)(6) was the improper vehicle to seek dismissal on the grounds of fraud between the parties, which is properly redressed by Rule 60(b)(3). Even taking Scott's motion as one under Rule 60(b)(3), however, the Court could not grant it because a Rule 60(b)(3) motion must be filed within one year after judgment was entered. On March 26, 1999, the Court ordered that Scott file no further pleadings in the nature of a motion to open or to reconsider these matters without obtaining the prior approval of the Court.

On December 22, 1998, the court denied Scott's motion in *Scott VI* on the same grounds. The Court also specifically addressed Scott's allegation that the defendants breached the Agreements by failing to file a motion with the Court to relieve Scott of sanctions. Finding that the Agreements stated that the defendants agreed to "waive and not seek sanctions against Scott" and that they did not agree to move the Court to lift its sanctions against Scott, the Court found that the defendants did not violate the terms of the Agreements. On December 22, 1998, the Clerk entered a judgment "that the plaintiff's motion to vacate on the grounds of fraud and based on defendants' alleged breach of the Agreement is denied."

C. Scott IX

In the meantime, on December 5, 1997, Scott filed his ninth *pro se* lawsuit (2:97cv1134) against Norfolk Southern, its employees, and agents. The original complaint alleged ten claims against W.D. Catron, Jr. and G.L. Hedgepath consisting of violations under: 1) 42 U.S.C.

§ 1981; 2) Racial Harassment under Va. Code Ann. 8.01-42.1;3) 42 U.S.C. §§ 1985(2) and (3); 4) 42 U.S.C. § 1986; 5) 42 U.S.C. § 1983; 6) the First, Fifth and Fourteenth Amendments of the United States Constitution; 7) Virginia Constitution, Art. I, Sec. 11 (which discusses due process of law and the right to be free from discrimination); and 8) Wrongful Discharge; 9) Intentional Infliction of Emotional Distress; and 10) Negligent Infliction of Emotional Distress. In January, 1998, Scott moved to amend his complaint. In the new complaint Scott largely reasserted the claims alleged in his original complaint against Catron and Hedgepath. Scott also added a tortious interference with contractual relations claim against them based on the same underlying facts, as well as an assault and battery claim against Catron.

In addition, Scott attempted to amend his complaint to add seventeen new claims against twenty-one new parties consisting of Norfolk Southern, sixteen Norfolk Southern employees,[2] three attorneys representing Norfolk Southern and their law firm.[3] The claims were based on events separate from those alleged in the original complaint. Scott attempted to add the following claims: 1)

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[2] Fourteen of these employees are the same as those sued on Scott's last case, Scott VIII. The remaining two, Petersen and Perreault, are corporate attorneys employed by Norfolk Southern.

[3] The three attorneys are Samuel J. Webster, Heather A. Mullen, and David N. Payne. All of these proposed defendants, as well as their law firm, Williams, Kelly & Greer, P.C., have previously been sued by Scott. These defendants are referred to as the "WKG Defendants."

breach of contract; 2) tortious interference with contractual relations; 3) fraud; 4) conspiracy to defraud; 5) claims pursuant to 42 U.S.C. § 1981, § 1985(2) and (3), § 1986, and § 1983; and violations of the 6) First and Fourteenth Amendments; 7) Va. Const., Art I, Sec. 11; and 8) RICO.

As the factual basis for these claims, Scott asserted the following facts: Scott claims that he wrote to the defendants in *Scott VII*[4] and *Scott IV*[5], on October 7, 1996, offering to drop the appeal in *Scott IV* and not appeal *Scott VII* and "to execute a release against all defendants in the referenced lawsuits for the matters related to both lawsuits, with the provision that "such a release should not affect the litigation in *Scott III*, *Scott V* and *Scott VI*." In exchange, Scott demanded "that the monetary sanctions awarded in *Scott IV* be eliminated[6] and that all necessary documents be prepared and submitted to the courts by [the defendants]." Scott claims that during a telephone conversation with Webster, Webster told Scott that the Court "would dismiss *Scott III* and grant the defendants' motion for sanctions against him" and also that "since the Court had stayed the proceedings in *Scott VI* until after the conclusion of *Scott V*, it was also likely that the Court would dismiss that case as well and grant defendants' motion for sanctions against [Scott]." Scott asserts that this created "extreme duress," and therefore, Scott told Webster "he would drop all lawsuits except

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[4] The Defendants party to this case were: the WKG law firm, Mullen, Payne, Kaufman & Canoles, Hunter W. Sims, Jr., R. Barrow Blackwell, Richard M. Feathers, and Norfolk Southern.

[5] This case was filed in the Norfolk Circuit Court.

[6] Scott claims the sanctions totaled $2,000.00.

Scott V so long as their dismissal had absolutely no effect on Scott's ability to fully pursue and litigate any and all claims and defendants associated with *Scott V*." Scott claims that Webster agreed and also agreed that "since *Scott V* and *Scott VI* had similar underlying facts giving rise to their causes of action, the dismissal of *Scott VI* should have absolutely no effect on Scott's ability to fully pursue and litigate any and all claims and defendants associated with *Scott V*, but should simply remove the case from the Court's docket as though it had never been filed." Scott asserts that Webster told him a Release was a formality that "would not have any effect on Scott's ability to fully pursue and litigate any and all claims and defendants associated with *Scott V*." Based on this assertion according to Scott, Scott executed the Releases.

In *Scott IX*, Scott claimed that the Releases he executed are being used by counsel in this litigation to prohibit Scott from pursuing his claims against Catron and Hedgepath. Scott bases these assertions on a December 10, 1997 letter he received from Catron and Hedgepath's attorney "specifically implying an intent for them to plead Release as a defense in this action." In Catron and Hedgepath's answer to Scott's amended complaint filed February 3, 1998, those defendants denied that Scott was unable to pursue his claims against them in *Scott V* in that the case proceeded to trial on some issues, Scott received an award which was paid and Scott was able to appeal issues, including the Court's denial of Scott's

attempt to add Catron and Hedgepath as John Doe defendants.[7]

The Court denied Scott's motion to amend the complaint in *Scott IX* on March 5, 1998. The Court Order noted the numerous attempts to amend in which Scott had engaged and that on repeated occasions, Scott's response to an adverse ruling or denial of a motion to amend was to file another lawsuit. The Court found that the amendment was for the purpose of harassing the defendants, the amendment would prejudice the defendants, and the amendment lacked good faith as it was based upon "oppressive person animosity."

On June 30, 1998, the Court dismissed all counts of the complaint in *Scott IX*. In July, 1998, the Court granted Catron and Hedgepath's motion for Rule 11 sanctions but denied their motion for sanctions pursuant to Rule 26(g).

On July 23, 1998, Scott moved the Court to vacate the judgment order, to reconsider the summary judgment and dismissal, or to conduct a rehearing. The Court denied these motions on September 2, 1998, and granted Catron and Hedgepath's motion for Rule 11 sanctions.

On October 26, 1998, Scott moved to vacate the September Order awarding sanctions and, relying on rule

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[7] These defendants assert that the Court denied Scott's motion to amend and add Catron and Hedgepath because it was the fourth motion to amend in the case and Scott knew the identity of those defendants prior to the execution of the release. These defendants were named as John Doe defendants in *Scott VI*, which was dismissed.

60(b)(3) & (6), the June judgment dismissing the complaint, and to restore the case to the active civil docket. On December 8, 1998, the Court denied these motions.

On November 5, 1998, Scott filed a notice of appeal. The Court of Appeal for the Fourth Circuit dismissed this appeal because of Scott's failure to post an appeal bond.

D. Comparison of the Amended Complaint in Scott IV and the Complaint in Scott XI

Count 14 of *Scott IX* alleges conspiracy to defraud. Scott sets forth in Paragraph 30 of his *Scott IX* amended complaint the basis for his allegation:

> NS, the Sixteen Individual Defendants and the WKG Defendants, singularly and in concert, engaged in or aided a plan, scheme and unlawful conspiracy and course of conduct through a series of deceptive acts to enter into an oral contractual agreement with Scott which they never intended to fulfill. These defendants knowingly agreed, singularly and in concert, to Webster . . . entering into an oral contractual agreement with the express intent of extorting Scott's release and dismissal of the *Scott VI* lawsuit in exchange for an oral contractual agreement between Scott, NS and the Fourteen Defendants to which all parties agreed and understood the the [sic] *Scott VI* Release would not and could not be used in any manner whatsoever by any defendant employee of NS, except the Fourteen Individual Defendants, whom Scott intended to sue for the allegations which formed the basis of *Scott V*.

Count I of Scott's Motion for Judgment in state court, which became *Scott XI* by removal, repeats this allegation almost exactly, with only a few syntactical changes and word substitutions (for example, "obtaining" for "extorting"). The proposed amendment in *Scott IX* continues:

> The defendants, through Webster, had him intentionally and deliberately mislead Scott about their future intentions and about the language of the Release for *Scott VI*. The defendants knew at the time the oral argument was made with Scott, including all representations therewith, that they would not perform on that oral contractual agreement and that their commitments were fraudulent and would mislead Scott, especially since Scott was litigating without the aid of professional counsel.

These allegations hardly undergo transformation when Scott attempted to revive them in state court:

> The defendants intentionally and deliberately misled and concealed relevant facts from Scott about their intentions and about the language of the release agreement for *Scott VI*. . . . The defendants knew at the time the settlement negotiations and contractual agreement were made with Scott, including all oral representations made therewith, that they would not perform on the negotiated understandings and agreements, and that their commitments were fraudulent and would mislead Scott and fraudulently induce him to execute the release agreements and dismissal orders for each *Scott* case, especially since Scott was litigating without the aid of professional counsel.

Scott's motion for judgment in state court, subsequently *Scott XI*, at 7. Count I of Scott's motion for judgment in state court continues, providing allegations of specific incidents of the alleged fraud. Count 2 of Scott's motion for judgment in state court, alleging tortious interference with agreements, similarly follows the allegation in Count 12 of the *Scott IX* proposed amended complaint ("Tortuous [sic] Interference With Contractual Relations), and he again buttresses his plain federal pleadings with details of specific conduct. Count 3 of the state motion again mirrors Count 19 of the *Scott IX* proposed amended complaint.

II. Analysis

A. Frivolous and Vexatious Nature of the Suit

In *Sassower v. Abrams*, 833 F.Supp. 253 (S.D. N.Y. 1993), the court dismissed a lawsuit filed by an excessively litigious *pro se* plaintiff on the ground that the litigation was frivolous and vexatious. In that case, the plaintiff had filed dozens of lawsuits and hundreds of motions in both federal and state courts, in an effort to relitigate the dissolution of Puccini Clothes, Ltd. In *Sassower*, the court noted that the plaintiff had attempted to evade the court's prefiling injunctions by filing the case in state court. The court found that "Each time a lawsuit filed by Sassower has been dismissed by a court, or a court has issued an injunction or other sanction to stop his abuse of the judicial system, Sassower simply institutes another action which adds the names of the judges that ruled against him." *Id.* at 256. The court recognized that while the plaintiff's case which originated in state

court did not fall within the scope of the prefiling injunction, "Sassower should not be able to use defendant's removal of these actions as an opportunity to thwart the clear intent of the 1985 injunction." *Id.* The court dismissed the lawsuit as frivolous and vexatious litigation.

The instant case bears several resemblances to *Sassower* even though, admittedly, Scott's litigation has not spanned decades, and he has not filed dozens of lawsuits (but he has filed, on these matters, over a dozen lawsuits that have reached this Court). As in *Sassower*, the Court has imposed a prefiling injunction on the plaintiff. Likewise, as the Court has noted several times in dealing with Scott, each time the Court denies a motion of Scott's or dismisses one of his cases, or sanctions Scott, he simply institutes another action and may or may not add more defendants.

Scott XI is based on the same allegations that Scott raised in *Scott IX*. The Court dismissed *Scott IX* and denied two motions to vacate that judgment. Adding these judgments to those made on the same issues in *Scott III* and *Scott VI*, Scott is asking the Court to consider for the eighth time the same set of issues. Accordingly, the Court **FINDS** that Scott's attempt to relitigate these issues constitutes frivolous and vexatious litigation. Moreover, in light of the similarity between Scott's federal pleadings and his motion for judgment in state court, the Court further **FINDS** that Scott instituted this litigation in state court for the purposes of evading this Court's prefiling injunction.

B. Claim Preclusion

Even were the Court not to find *Scott XI* vexatious and frivolous litigation, the case would be dismissed on grounds of claim preclusion. The doctrine of claim preclusion, or *res judicata*, provides that "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Restatement (Second) Judgments § 19 (1982). Three requirements exists [sic] for the invocation of claim preclusion: (1) parties must be the same or in privity with the original parties; (2) the claims in the subsequent litigation must be substantially the same as those in the prior litigation; and (3) the earlier litigation must have resulted in a final judgment on the merits. *Shoup v. Bell & Howell Co.*, 872 F.2d 1179 (4th Cir. 1989). It should be noted that federal, not state, law determines the preclusive effect of a prior federal judgment. *Id.*

Because the first two requirements have clearly been met, the Court focuses its analysis on the third requirement, that the litigation resulted in a final judgment on the merits. A judgment on the merits is "one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form." *Fairmont Aluminum Company v. Commissioner of Internal Revenue*, 22 F.2d 622 (4th Cir. 1955), *citing*, *Swift v. McPherson*, 232 U.S. 51 (1914); *Clegg v. United States*, 112 F.2d 886, 887 (10th Cir. 1940). The United States Supreme Court, in *Angel v. Bullington*, 330 U.S. 183, 189 (1947) stated: "[a]n adjudication of an issue implies that a man had a chance to win his case." The Court further stated: "[i]t is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the

'merits' in the sense of ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State." *Id.* at 190. The Court of Appeal for the Fourth Circuit has applied this standard to hold that a federal district court's dismissal of an action on statute of limitations grounds is a final judgment on the merits. *Shoup*, 872 F.2d 1178, 1181 (finding that a statute of limitations dismissal assumes the court "could have spoken but refuses to do so").

As the Court of Appeal for the Eighth Circuit has recognized, the denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amended pleading. *See, King v. Hoover Group, Inc.*, 958 F.2d 219, 222-23 (8th Cir. 1992); *Carter v. The Money Tree Company*, 532 F.2d 113, 115 (8th Cir. 1976). In *Scott IX*, the Court denied Scott's motion to amend to add the same claims which he now asserts. The Court denied Scott's motion on the grounds that the amended complaint was interposed for the purpose of harassing the defendants, and because the amendment would prejudice the existing and proposed defendants. The Court concluded that the amended complaint lacked good faith. Accordingly, the Court **FINDS** that its denying Scott leave to amend *Scott IX* constituted judgment on the merits.

Because of the frivolous and vexatious nature of *Scott XI* and because claim preclusion bars Scott from reasserting these claims, the Court **DISMISSES** *Scott XI* with prejudice. Scott's motions to dismiss, to withdraw his motion to dismiss, and to remand are **MOOT**.

III. Scott's Sanctionable Conduct

At the hearing on April 21, 1999, the Court advised Scott that if it found "that this case was filed in an effort to avoid its prefiling for [sic] injunction, then that would, of course, be sanctionable conduct." Tr. 11. The Court **FINDS** that Scott filed this case in order to avoid the Court's prefiling injunction. However, because Scott is currently serving six months probation for contempt of court in relation to a related matter, *Scott X* (2:98cv180), the Court shall, at this time, withhold ruling on whether sanctions should be imposed.

The Court again advises Scott, as it did at the April hearing, that it will not "entertain any post-decision motions by Scott unless and until he pays in full the sanctions which the Court has previously imposed in the other related litigation." Tr. 11.

The Plaintiff is advised that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this order.

The Clerk is **DIRECTED** to send a copy of this order to Plaintiff and to all counsel of record.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT
JUDGE

Norfolk, Virginia
March 27, 2000

RESPONDENTS' APPENDIX E

JUDGMENT IN SCOTT XI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
March 28, 2000

MICHAEL A. SCOTT,

Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Civil Case No.: 2:99cv348

[ ] Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to decision before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is DISMISSED with prejudice and plaintiff's motions to

dismiss, to withdraw his motion to dismiss, and to remand are MOOT.

March 27, 2000
DATE

NORMAN H. MEYER, JR.,
CLERK
By: /s/ Delores S. Mason
Delores S. Mason, Deputy
Clerk

RESPONDENTS' APPENDIX F

SCOTT XI APPEAL BOND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED
May 4, 2000

MICHAEL A. SCOTT,

Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION, et al.

Defendants.

Civil Action No.:
2:99cv348

ORDER REQUIRING AN APPEAL BOND

On April 25, 2000, Michael A. Scott filed a notice of appeal of the Court's final order in this case. On May 3, 2000, the defendants moved the Court to require that Scott post an appeal bond in the amount of $1,500.00 to ensure payment of the defendants' appellate costs.

Rule 7 of the Federal Rules of Appellate Procedure permits a district court to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." In accordance with this rule, the Court **ORDERS** that Scott file a bond in the amount of $1,000.00 to ensure payment of the defendants' appellate costs.

The Clerk is **DIRECTED** to send a copy of this order to the Plaintiff and to all counsel of record.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT
JUDGE

Norfolk, Virginia
May 4, 2000

RESPONDENTS' APPENDIX G

DISTRICT COURT ORDER DISMISSING SCOTT XIII

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED
April 7, 2000

MICHAEL A. SCOTT, *pro se*,

Plaintiff,

v. Civil Action No. 2:99cv1814

NORFOLK SOUTHERN CORPORATION, *et al.*,

Defendants.

ORDER OF DISMISSAL

On October 6, 1999, Michael A. Scott, *pro se*, filed this lawsuit in Circuit Court for the City of Virginia Beach. On October 28, 1999, the defendants removed the case to federal court. Upon removal, this case became *Scott XIII*, the thirteenth case filed by Scott against his former employer, Norfolk Southern Corporation, their employees, agents, and attorneys, (the "Norfolk Southern defendants") to reach this Court. On November 8, 1999, Scott moved to remand this action. On March 28, 2000, Scott requested a hearing on his motion to remand.

Having reviewed the parties' briefs, the Court **FINDS** it unnecessary to hold a hearing on the motion to remand. For the reasons stated herein, the Court **DISMISSES** this action with prejudice.

I. Allegations in *Scott XIII*

On October 4, 1999, in a related cause of action, *Scott X* (2:98cv180), the Court, having previously found Scott in contempt of court for failing to obey court orders, ordered the United States Probation Office to produce a Pre-Sentence Investigation Report on Scott, and ordered Scott to appear on January 4, 2000, for his sentencing. On October 6, 1999, Scott filed this lawsuit in the Circuit Court for the City of Virginia Beach. Scott named as defendants: Norfolk Southern, David R. Goods, Steven c. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, Williams Kelly & Greer, P.C., Ernie Price, Elias Vega, M. J. Moore, Roger A. Petersen, Mark D. Perreault, and Robert C. Scaro. As of October 28, 1999, the date of removal, defendants Manetta, Hale, and Luttrell had not been served. It is not clear whether defendants Catron and Payne had been properly served.

The allegations in *Scott XIII* concern four areas of factual contentions: (1) Scott's alleged employment contracts; (2) the Release Agreements; (3) the defendants' efforts to collect sanctions; and (4) the defendants' presentation of evidence during Scott's contempt hearing.

1. Employment Contracts

Scott alleges that the defendants "breached and tortuously [sic] interfered with the contract from defendant Goode guaranteeing Scott the right to work without such malicious, abusive and discriminatory conduct in the work place." He alleges that he was the subject of racial and sexual harassment between March 1993 and February 16, 1996. Scott further alleges that this alleged conduct on the part of the defendants "breached and tortuously [sic] interfered with the compliance policy contract." Scott also alleges that this alleged conduct, "their 'unlawful discrimination, sexual harassment and retaliation in the work place,' defamation, assault and battery, and termination breached and tortuously [sic] interfered with the employment contract."

Scott alleges that the defendants "breached and tortuously [sic] interfered with" alleged contracts guaranteeing that Scott would continue to work throughout 1996. He alleges that the defendants' transferring Scott to Decatur, Illinois, from Norfolk constituted "terminating Scott's employment."

2. Release Agreements

On October 10, 1996, Scott and the Norfolk Southern defendants entered into Settlement and Release Agreements ("Release Agreements") in which Scott agreed to dismiss and forego "further litigation against NS and any of its officers, directors, agents, employees, or former employees" in *Scott IV* (2:95cv1163), *Scott VI* (2:96cv610), and *Scott VII* (2:96cv699).

In the instant action, *Scott XIII*, Scott alleges that the defendants "fraudulently induced Scott to execute the release agreements and dismissal orders, and evinced an intent to practice actual fraud and or constructive fraud, deceit or misrepresentation.

3. Collection of Sanctions

On December 17, 1997, and by an amended order of December 19, 1997, the Court ordered Scott to pay $9,143.13 in sanctions to the Norfolk Southern defendants. On January 9, 1998, Scott moved for reconsideration of the damages award. He appealed the sanctions judgment on January 16, 1997. The defendants initiated collection proceedings in Virginia Beach Circuit Court. In that court, Scott moved for a "Protective Order, for Stay and to Dismiss, and Objections to Interrogatories" and filed *Scott X* (2:98cv180) in federal court to claim that defendants' preliminary efforts to collect the sanctions were illegal. On July 22, 1998, the Court imposed a $100 contempt fine on Scott and granted the Norfolk Southern defendants' motion for Rule 11 sanctions. On September 22, 1998, after reviewing the defendants' statement of attorneys' fees and costs, the Court ordered Scott to pay the Norfolk Southern defendants $5,000.00 "to partially reimburse the defendants for their attorneys' fees and costs associated with defending *Scott X*." Noting "that Scott's response to prior sanction awards is to refuse to pay and institute new lawsuits concerning the defendant's [sic] legal efforts to collect the sanctions judgment," the Court advised Scott that filing frivolous lawsuits on these issues might again lead the Court to

hold him in contempt. On July 16, 1998, Scott moved to vacate. The Court denied his motion on September 2, 1998. Again, on September 9, 1998, Scott moved to vacate or reconsider the orders awarding sanctions and finding Scott in contempt. This motion was denied on December 1, 1998. On July 7, 1999, after his appeal to the Court of appeals was dismissed for failure to post a bond, Scott moved for a third time to vacate the sanctions order.

In *Scott XIII* Scott again alleges that the defendants did not follow proper procedures in attempting to collect the sanctions and alleges that "[t]he conduct of the defendants (excluding Payne) fraudulently induced the imposition of a $5,000 sanction against Scott by the federal court, and evinced an intent to practice actual fraud and or constructive fraud, deceit and or misrepresentation." He alleges malicious abuse of the legal process, malicious prosecution, and violation of his rights under Article I, § 11, of the Virginia Constitution.

4. Defendants' Presentation of Evidence During Contempt Hearing

Scott alleges that the defendants "humiliated, belittled, defamed and insulted Scott, and evinced an intent to maliciously prosecute (both civilly and criminally) Scott in the federal court in order to force payment of the sanctions." As the basis for these allegations, Scott draws on the defendants' presentation of evidence during a hearing where the Court had ordered Scott to show cause why he should not be held in contempt. At the hearing the defendants presented a deposition of George Mungin that suggested that Scott had helped Mungin prepare his

complaint for federal court. In light of this evidence, the Court continued the show cause hearing so that it could determine whether Scott had perjured himself and whether he had practiced law illegally. At the continuation of the hearing, the court made no such findings.

II. *Procedural and Factual Background*[1]

Much of the factual background of *Scott XIII* is the history of Scott litigation. Both the plaintiff and the defendants have raised issues that depend on familiarity with this history. Accordingly, the Court briefly sets forth, at the risk of oversimplifying these matters, a recapitulation of Scott's cases against the Norfolk Southern defendants.

Scott I and *Scott III*[2]

Scott I (2:95cv377) and *Scott III* (2:95cv815), alleged breach of contract, battery, intentional infliction of emotional distress, and a Title VII claim, all arising from Scott's allegations that he was subjected to same-sex harassment while an employee at Norfolk Southern. The Court granted summary judgment in favor of the defendants on the Title VII claim, and a jury awarded Scott $50,000 on the battery claim. On January 5, 1996, Norfolk

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[1] The Court has construed the facts as presented here solely upon the existing record and for the limited purposes of determining whether the Court has jurisdiction, ruling on the plaintiff's motion, and deciding whether to dismiss this action.

[2] *Scott II* (2:95cv798) was dismissed without prejudice upon motion of Scott, who was proceeding *pro se*.

Southern offered Scott $70,000 in exchange for his resignation and release of any additional legal claims against Norfolk Southern.[3] Scott declined Norfolk Southern's offer.

Scott IV[4]

On December 5, 1995, Scott, *pro se*, filed a complaint, *Scott IV* (2:95cv1163),[5] against Norfolk Southern and some of its employees alleging breach of duty under the Federal Employers' Liability Act ("FELA") by failing to provide an emotionally safe work place; sexual assault and batter [sic] under FELA, intentional infliction of emotional distress under FELA, and negligent infliction ofemotional distress under FELA. Scott amended his complaint to include an allegation of retaliation and conspiracy

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[3] At the time, Scott had instituted another suit in federal court against the defendants and another in state court. In the state case (At Law No. L96-392, Norfolk Cir. Ct.), Scott alleged that Norfolk Southern and its counsel in *Scott I* and *Scott III* presented an improper and malicious defense in those cases. Norfolk Circuit Court dismissed this case.

[4] The Court has referred to this case as *Scott III* in its dismissal order in 2:99cv 348 (*Scott XI*) and in previous orders. The combination of *Scott I* (2:95cv377) and *Scott III* 2:95v815) into what has been called *Scott I*, because the Court did not anticipate so many subsequent cases over several years, has created some confusion in the numbering system. The Court now provides each action with an ascending Roman number according to its filing date, regardless of whether actions were combined. The action numbers, of course, provide the most reliable source of identification.

[5] The defendants in *Scott IV* were: Norfolk Southern, Donald D. Graab, Jerry R. Gray, Jeff E. Pair, and Jerry W. Clemmer,

under the First Amendment and the Civil Rights Act of 1866 and to include the following individual defendants: J.W. Clemmer, Jeff Pair, Jerry Gray, and Donald Graab. The Court dismissed the suit against Norfolk Southern on *res judicata* grounds. The Court ordered Scott to particularize the complaint as it related to Clemmer, Pair, Gray, and Graab. On October 15, 1996, upon stipulation by Scott and counsel for the defendants, the Court dismissed this action.

Two years later, on October 26, 1998, Scott moved to vacate the Court's dismissal of *Scott IV*. On March 23, 1998, the Court found that the defendants had not violated the terms of the Release Agreements and denied Scott's motion. On March 26, 1999, the Court ordered that Scott may file no further pleadings in the nature of motions to reopen or reconsider without prior approval of the Court.

Scott V

On May 2, 1996, Scott, *pro se*, filed a 32-count complaint, *Scott V* (2:96cv257),[6] against Norfolk Southern and fourteen of its employees. In his fifth amended complaint Scott alleged: (Count 1) Title VII racial discrimination and retaliation for Scott's previous EEOC charge and lawsuits against Norfolk Southern and its employees and agents; (Count 2) personal injury under FELA; (Count 3) common law assault and battery; (Count 4) Virginia common law

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[6] The defendants in *Scott V* were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon Manetta, William Honeycutt, Lewis Hale, Timothy Heilig, C.D. Vittur, Donald D. Graab, Artis Luttrell, Jerry Gray, Wayne Henley, Jeff Pair, J.W. Clemmer, and three John Doe Police Agents for Norfolk Southern.

wrongful discharge; (Count 5) intentional infliction of emotional distress under FELA; (Count 6) negligent infliction of emotional distress under FELA; (Count 7) Virginia common law intentional infliction of emotion distress; and (Count 8) Virginia common law negligent infliction of emotional distress. On February 5, 1997, the Court granted the defendants' motions for summary judgement on Counts 1, 5, 6, 7, and 8. The Court denied the defendants' motion to dismiss Count 4 and denied their motion for summary judgment on Counts 2 and 3.

On April 2, 1997, a jury found that Scott was not racially harassed in violation of federal law, that Scott was not terminated because of his race in violation of federal law, and that Scott was not terminated because of his race in violation of state law. The jury found for the defendants on the assault and battery charge. Finding for Scott on the remaining FELA charge, the jury stated that the percentage of Scott's negligence contributing to his injury was 51%. Scott was awarded $4,998.00.

Scott VI

On June 14, 1996, Scott, *pro se*, filed *Scott VI* (2:96cv610), a seventeen-count complaint against the same defendants named in *Scott V*.[7] *Scott VI* alleged racial discrimination and retaliation for filing *Scott I* and *Scott*

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[7] The defendants in *Scott VI* were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon Manetta, William Honeycutt, Lewis Hale, Timothy Heilig, C.D. Vittur, Donald D. Graab, Artis Luttrell, Jerry Gray, Wayne Henley, Jeff Pair, J.W. Clemmer, and three John Do [sic] Police Agents for Norfolk Southern.

II, in violation of the Constitution, the Virginia Constitution, RICO, and FELA. By stipulation of the parties, this action was dismissed on October 15, 1996.

Two years later, on October 26, 1998, Scott moved to vacate the Court's dismissal on grounds of fraud and based on defendants' alleged breach of the Release Agreements. The court denied this motion.

Scott VII

On July 11, 1996, Scott, *pro se*, filed *Scott VII* (2:96cv699)[8] alleging that Norfolk Southern, three attorneys from Williams, Kelly & Greer, and four attorneys from Kaufman and Canoles maliciously abused the legal process in the defense of *Scott IV* in the Norfolk City Court. Scott alleged that the defendants, motivated by racial hatred, conspired to belittle, racially humiliate, harass and intimidate Scott through (1) threatening to seek sanctions; (2) the language in defendants' court filings; (3) engaging in *ex parte* communications with the judge; and (4) conspiring with the judge to retaliate, intimidate, and humiliate Scott. By stipulation of the parties, this action was dismissed on October 15, 1996.

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[8] The defendants in *Scott VII* were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C.D. Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, and J.W. Clemmer.

Scott VIII

On May 27, 1997, Scott, *pro se*, filed *Scott VIII* (2:97cv522)[9] against Norfolk Southern, Landmark Communications, and fourteen individual employees of Norfolk Southern. Scott claims that Norfolk Southern, through individual defendants, allegedly wrote classified ads that appeared in *The Virginian-Pilot*, owned by Landmark. Scott claimed that the ads harmed his personal and professional reputation and interfered with his ability to enter into business and educational relationships. Scott further alleged that the ads were motivated by racial animus and were in retaliation for his previous Title VII lawsuits. All counts except those against the individual defendant Clemmer were dismissed. On May 15, 1998, a jury returned a verdict in favor of Clemmer. On February 10, 1999, the Court of Appeals affirmed the judgment of the District Court.

Scott IX

On December 5, 1997, Scott, *pro se*, filed *Scott IX* (2:97cv1134)[10] against Norfolk Southern, its employees,

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[9] The defendants in *Scott VIII* were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C.D. Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, J.W. Clemmer, and Landmark Communications.

[10] The defendants in *Scott IX* ultimately were: Norfolk Southern, David R. Goode, Steven Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry

an [sic] agents. The original complaint alleged ten claims against W.D. Catron, Jr. and G.L. Hedgepath consisting of violations under: 1) 42 U.S.C. § 1981; 2) Racial Harassment under Va. Code Ann. 8.01-42.1; 3) 42 U.S.C. §§ 1985(2) and (3); 4) U.S.C. § 1986; 5) 42 U.S.C. § 1983; 6) the First, Fifth and Fourteenth Amendments of the United States Constitution; 7) Virginia Constitution, Art. I, Sec. 11 (which discusses due process of law and the right to be free from discrimination); and 8) Wrongful Discharge; 9) Intentional Infliction of Emotional Distress; and 10) Negligent Infliction of Emotional Distress. In January, 1998, Scott moved to amend his complaint. In the new complaint Scott largely reasserted the claims alleged in his original complaint against Catron and Hedgepath. Scott also added a tortious interference with contractual relations claim against them based on the same underlying facts, as well as an assault and battery claim against Catron.

In addition, Scott attempted to amend his complaint to add seventeen new claims against twenty-one new parties consisting of Norfolk Southern, sixteen Norfolk Southern employees,[11] three attorneys representing Norfolk Southern, and the attorneys' law firm.[12] The claims

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Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Roger A. Petersen, Mark D. Perreault, Heather A. Mullen, David Payne, Sam Webster, Williams Kelly & Greer, P.C.

[11] Fourteen of these employees are the same as those sued in Scott's last case, Scott VIII. The remaining two, Roger A. Petersen and Mark D. Perreault, are corporate attorneys employed by Norfolk Southern.

[12] The three attorneys are Samuel J. Webster, Heather A. Mullen, and David N. Payne. All of these proposed defendants,

were based on events surrounding the execution of Release Agreements in *Scott IV*, *Scott V*, *Scott VI*, and *Scott VII*. The claims included: 1) breach of contract; 2) tortious interference with contractual relations; 3) fraud; 4) conspiracy to defraud; 5) claims pursuant to 42 U.S.C. § 1981, § 1985(2) and (3) § 1986, and § 1983; and violations of the 6) First and Fourteenth Amendments; 7) Va. Const., Art. I, Sec. 11; and 8) RICO.

The Court denied Scott's motion to amend the complaint in *Scott IX* on March 5, 1998. The Court Order commented on Scott's numerous attempts to amend and noted that on repeated occasions, Scott's response to an adverse ruling or denial of a motion to amend was to file another lawsuit. The Court found that the amendment was for the purpose of harassing the defendants, the amendment would prejudice the defendants, and the amendment lacked good faith as it was based upon "oppressive personal animosity."

On June 30, 1998, the Court dismissed all counts of the complaint in *Scott IX*. In July, 1998, the Court granted Catron and Hedgepath's motion for Rule 11 sanctions but denied their motion for sanctions pursuant to Rule 26(g).

On July 23, 1998, Scott moved the Court to vacate the judgment order, to reconsider the summary judgment and dismissal, or to conduct a rehearing. The Court denied these motions on September 2, 1998, and granted Catron and Hedgepath's motion for Rule 11 sanctions.

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as well as their law firm, Williams, Kelly & Webster, P.C., have previously been sued by Scott. These defendants are referred to as the "WKG Defendants."

On October 26, 1998, Scott moved to vacate the September Order awarding sanctions and, relying on Rule 60(b)(3) & (6), to vacate the June judgment dismissing the complaint, and to restore the case to the active civil docket. On December 8, 1998, the Court denied these motions.

On November 5, 1998, Scott filed a notice of appeal. The Court of Appeal for the Fourth Circuit dismissed this appeal because of Scott's failure to post an appeal bond.

Scott X

On February 17, 1998, Scott, *pro se*, filed *Scott X* (2:98cv180),[13] in which Scott disagreed with the preliminary efforts of the Norfolk Southern defendants to collect the *Scott VIII* sanctions judgment entered against Scott. On June 22, 1998, the Court granted the defendants' motions to dismiss and motions for summary judgment. The Court also imposed $5,000 in sanctions against Scott in this case. On July 16, 1998, Scott filed his first motion to vacate in this case. The Court denied that motion on September 2, 1998. Scott then filed another motion to vacate, which the Court denied on December 2, 1998. Next Scott appealed the dismissal of *Scott X* to the United States Court of Appeals for the Fourth Circuit. The

[13] The defendants in *Scott X* were: Norfolk Southern, David R. Goode, Steven Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Heather A. Mullen, Elias I. Vega, Williams, Kelly & Greer, P.C., Roger A. Petersen, Mark D. Perreault, Sam Webster, and Williams, Kelly & Greer.

Fourth Circuit dismissed the appeal for Scott's failure to post an appeal bond. On July 7, 1999, Scott filed a third motion to vacate judgment dismissing the case, to vacate judgment awarding sanctions against the plaintiff, and to restore the case to the active civil docket. On August 26, 1999, after a show cause hearing, the Court found Scott in contempt of court.

Scott XI

Scott XI (2:99cv348)[14] is a case that was originally filed, *pro se*, in the Circuit Court for the City of Norfolk. On March 8, 1999, the defendants timely filed notice of removal. Scott alleged that the defendants fraudulently induced him to execute release agreements and dismissal orders in *Scott IV* (2:95cv1163), *Scott VI* (2:96cv610), and *Scott VII* (2:96cv699). He also alleged that the defendants evinced an intent to practice actual fraud and/or constructive fraud, deceit, and/or misrepresentation when they did not carry out an oral agreement promising Scott that they would not raise any affirmative defenses in *Scott IX* and that they would file motions with the Court withdrawing sanctions motions and "eliminate" sanctions which had been imposed. Count Two alleged that the defendants "beached [sic] and tortuously [sic] interfered with, and conspired to breach" the release agreements.

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[14] The defendants in *Scott XI* are Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, and Williams, Kelly & Greer, P.C.

Count Three alleged that the defendants' conduct with regard to the release agreements violated 42 U.S.C. § 1981. Finding Scott's lawsuit to be frivolous, the Court dismissed *Scott XI* on March 27, 2000. The Court found that *Scott XI* was based on the same allegations that Scott raised in *Scott IV*, *Scott VI*, and *Scott IX*.

Scott XII

On June 17, 1999, Scott, *pro se*, filed *Scott XII* (2:99cv935)[15] in federal court and amended his complaint on July 1, 1999. Scott again alleged that the Norfolk Southern defendants' initial attempts to collect sanctions against Scott were procedurally illegal. Scott alleged violation of the Fair Debt Collection Act; malicious abuse of process and malicious prosecution, intent to practice actual or constructive fraud, misrepresentation and deceit; violations of his rights under the Virginia constitution, the federal constitution, and Sections 1981, 1983, 1985, and 1986 of the U.S.C. Title 42; and violations of various Virginia statutes. *Scott XII* is currently pending before this Court.

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[15] The Defendants in *Scott XII* are Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Elias I. Vega, Gary L. Hedgepath, David G. Petersen, Mark D. Perreault, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, and Williams, Kelly & Greer, P.C.

III. *Analysis*

A. *Jurisdiction and Scott's Motion to Remand*

Upon removal the federal court acquires complete and exclusive jurisdiction. *French v. Hay*, 89 U.S. (22 Wall.) 238 (1874); *Texas Pipe Line Co. v. Ware*, 15 F.2d 171 (8th Cir.), *cert. denied*, 273 U.S. 742 (1926); *see also* 28 U.S.C. §§ 1447 & 1448 (authorizing the district court to issue all necessary orders to bring parties before it, giving the district court subject matter jurisdiction to rule on a motion to remand, and permitting service of process under the federal rules). Scott argues that the removal was procedurally defective. He argues that not all defendants were properly served and thus could not join in the removal, and he argues that defense counsel's assertion that they represent all the defendants is insufficient indication that these attorneys do, indeed, represent the defendants. None of these arguments is meritorious. At the most basic level, the removal statutes do not require, as Scott argues, that "all" defendants join in the removal procedure. On the contrary, the statutes contemplate serving some defendants after removal to federal court. 28 U.S.C. §§ 1447 & 1448.

Scott also argues that this action should be remanded because he asserts only state claims. In support of his argument he concedes that "he has no timely action under any federal civil rights law."

Although Scott's motion for judgment in state court facially appears to be a state claim, the federal court must occasionally look beyond the pleadings "to determine whether the real nature of the claim is federal, regardless of the plaintiff's characterization." *Federated Department*

Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981) (quoting 14C Wright, Miller, & Cooper, Fed. Prac. & Proc. § 3722 (1976)). The district court must review and analyze "the origins and substance of" the complaint and determine whether the plaintiff "had attempted to avoid removal jurisdiction by artfully casting [his] essentially federal law claims as state-law claims." *Federated Department Stores v. Moitie*, 452 U.S. at 397 n.2. The district court must exercise its jurisdiction to determine whether it has jurisdiction over purported state law claims. In *Scott XIII*, as in *Moitie*, this determination involves *res judicata* concerns.

The facts in *Scott XIII* are similar in important aspects to those presented to the Supreme Court in *Moitie*. In *Moitie*, two plaintiffs whose claims had been dismissed in federal court refiled the actions in state court. The state court actions purported to raise only state-law claims, but the allegations involved "the same parties, the same alleged offenses, and the same time periods" as the previously dismissed federal claims. *Id.* at 396. Upon removal, the district court dismissed the claims on grounds of *res judicata*. *Id.* The district court "held that the complaints, though artfully couched in terms of state law, were in many respects identical with the prior complaints, and were thus properly removed to federal court because they raised essentially federal law claims." *Id.* (quotations omitted). The Court of Appeals for the Ninth Circuit reversed on grounds of a public policy exception to *res judicata*. The Supreme Court again reversed, asserting the importance of *res judicata*, which the Court described as "a rule of fundamental and substantial justice, 'of public

policy and private peace.' " *Id.* at 401 (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)).

The doctrine of *res judicata* precludes a plaintiff from bringing a claim that he brought or could have brought in a prior action. *Federated Department Stores v. Moitie*, 452 U.S. at 398 (citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877)). Thus, a prior cause of action embraces and perhaps precludes subsequent litigation of "all rights of the plaintiff to remedies against the defendant[s] with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) Judgments § 24. If an action is based on the same series of events or transactions as previously litigated, then the district court has jurisdiction continuing from its jurisdiction in the prior litigation.

The allegations in *Scott XIII* involve, for the most part, the same parties, the same alleged offenses, and the same time periods as did *Scott IV*, *Scott VI*, *Scott IX*, and *Scott XI*. Even Scott's claims arising from defendants' new conduct, the presentation of evidence during Scott's contempt hearing in this Court, are part of the same series of transactions or events giving rise to prior litigation. Moreover, it is clear, as will be discussed herein, that Scott filed this action in state court in an effort to avoid the prefiling injunction that this Court has imposed against him. Thus, the Court **FINDS** that it has jurisdiction over this action, *Scott XIII*. For these reasons, the Court also **DENIES** Scott's motion to remand.

B. Res Judicata

The doctrine of *res judicata*, or claim preclusion, provides that "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Restatement (Second) Judgments § 19 (1982). "To establish a *res judicata* defense, a party must establish: (1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997). Federal, not state, law determines the preclusive effect of a prior federal judgment. *Shoup v. Bell & Howell Co.*, 872 F.2d 1179 (4th Cir. 1989).

The relevant earlier litigation, *Scott IV*, *Scott VI*, *Scott IX*, and *Scott XI*, resulted in final judgments on the merits.[16]

By arguing that *Scott XIII* raises only state claims, Scott impliedly raises the issue of whether the claims in the subsequent litigation are substantially the same as those in the prior litigation. Even were the Court to consider these claims as only state-law claims, they are nonetheless barred by *res judicata*. The claims extinguished include "all rights of the plaintiff to remedies against the defendant[s] with respect to all or any part of the transaction, or series of connected transactions, out of

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[16] Denial of Scott's motion to amend in *Scott IX* constitutes *res judicata* on the merits. *See King v. Hoover Group, Inc.*, 958 F.2d 219, 223-23; *Shoup v. Bell & Howell Co.*, 872 F.2d 1179 (1989); *see also Scott v. Norfolk Southern, et al.*, Civil Action No. 2:99cv348 (E.D. Va., Mar. 27, 2000) (order dismissing case).

which the action arose." Restatement (Second) Judgments § 24. Claim preclusion bars not only those claims that Scott actually brought but also those claims that he could have brought because they arose out of the same transaction or series of transactions as the previous litigation.

Thus the only remaining element to consider is whether the parties were identical or were in privity with the original parties. The privity requirement is met when "the person [allegedly] in privity is so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jones v. SEC*, 115 F.3d, at 1180 (internal quotation marks omitted).

Scott had previously objected in federal (*Scott X*) and state court, to preliminary efforts to collect court-imposed sanctions by all the defendants named in *Scott XIII* except for David N. Payne, Ernie Price, M. J. Moore and Robert C. Scaro. Scott alleges that Payne and Scaro[17] were attorneys for Williams, Kelly & Greer and apparently brings this action against them in that capacity. Moreover, in his motion for judgment, Scott refers to Webster, Mullen, Scaro, and Payne "collectively with WKG . . . as the 'WKG Defendants'." Because Payne and Scaro appear to be so identified with Webster, Mullen, and Williams, Kelly & Greer, defendants in *Scott X*, the Court **FINDS**

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[17] The Court makes no finding as to whether Scaro was an attorney for Williams, Kelly & Greer. If he was so employed, then Scott's claims against him are barred by claim preclusion; if he is not, then Scott's claims against him would necessarily be dismissed for failure to state a claim upon which relief could be granted.

that, for the purposes of *res judicata*, Payne and Scaro represent the same legal right with respect to Norfolk Southern's efforts to collect sanctions. Accordingly, the Court **FINDS** Payne and Scaro to be in privity with the defendants in *Scott X*.

Scott had previously asserted claims on the alleged employment contracts and the release agreements against all parties, including the "WKG defendants," named in *Scott XIII* except for Price, Vega, Moore, and Scaro. Although Scott alleged that Vega and Price were also employees of Norfolk Southern, the defendants have denied this allegation. Insofar as Scott is suing Vega and Price in their alleged capacities as employees of Norfolk Southern on the same issues that Scott had previously raised against Norfolk Southern, its agents, and employees, the Court **FINDS** that Vega and Price were in privity with the defendants in prior litigation.[18]

Accordingly, the Court **FINDS** that Scott's claims concerning the alleged employment contracts are barred by claim preclusion stemming from his having previously enjoyed a full and fair opportunity to litigate these matters in *Scott V*, *Scott VI*, and *Scott IX*. The Court **FINDS** that Scott's claims with respect to the Release Agreements are barred by claim preclusion because he had a full and fair opportunity to litigate these matters in *Scott IV*, *Scott*

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[18] The Court makes no finding as to whether Vega and Price are employees of Norfolk Southern, If they are employees, then Scott's claims against them are barred by claim preclusion; if they are not employees of Norfolk Southern, Scott's claims against them would necessarily be dismissed for failure to state a claim upon which relief could be granted.

VI, Scott IX, and *Scott XI.* The Court **FINDS** that Scott's claims with respect to defendants' preliminary efforts to collect court-imposed sanctions are barred by claim preclusion because he had a full and fair opportunity to litigate these matters in *Scott X* as well as in state court.

C. Defendants' Presentation of Evidence During the Contempt Hearing

As a new cause of action stemming from the defendants' presentation of evidence during the contempt hearing, Scott alleges that the defendants "humiliated, belittled, defamed and insulted Scott, and evinced an intent to maliciously prosecute (both civilly and criminally) Scott in the federal court in order to force payment of the sanctions." The Court **FINDS** that Scott has failed to state a claim upon which relief can be granted and that he has filed these additional claims in bad faith with the sole purpose of harassing the defendants.

D. Frivolous and Vexatious Nature of the Suit

Rule 11 of the Federal Rules of Civil Procedure imposes a duty that pleadings be well-grounded in fact and law and not interposed for an improper purpose. *See also Introcasco v. Cunningham,* 857 F.2d 965, 970 (4th Cir. 1988).

Scott has filed over a dozen lawsuits against Norfolk Southern, its agents, and employees over the last five years. Moreover, as the Court has often observed, when the Court denies one of Scott's motions, dismisses his case, or sanctions Scott, Scott either moves the Court to

vacate or initiates another action. For example, through motions or new actions, Scott has asked this Court ten times to rule on his allegations of fraud, breach of contract, and misrepresentation with respect to the Release Agreements. Although some of Scott's initial claims were meritorious – and he was awarded damages – much of Scott's subsequent litigation was instituted in this Court or in state court for improper purposes.

The Court has repeatedly advised Scott not to file frivolous claims. The Court imposed modest then increasing sanctions on Scott for filing such claims. On October 4, 1999, after having found Scott again in contempt, the Court ordered the United States Probation Office to produce a Pre-Sentence Investigation Report on Scott. Two days later, on October 6, instead of heeding the warnings against filing successive suits on the same issues, Scott filed a motion for judgment in the Circuit Court of Virginia Beach, alleging the same claims that he had raised numerous times in federal court. The Court **FINDS** that this was an attempt to avoid the Court's prefiling injunction and an attempt to avoid the preclusive effect of litigation in this Court. Scott accuses the defendants of malicious abuse of the legal process. Clearly it is Scott who is abusing the legal process. "A litigious plaintiff pressing a frivolous claim, though rarely succeeding on the merits, can be extremely costly to the defendant[s] and can waste an inordinate amount of court time." *Sassower v. Whiteford, Taylor & Preston*, 940 F.2d 653 (4th Cir. 1991) (unpublished opinion) (quoting *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980).

IV. Conclusions

For the most part, *Scott XIII* is based on the same allegations that Scott raised in *Scott IV*, *Scott VI*, *Scott IX*, and *Scott XI*. To the extent that *Scott XIII* asserts claims based on the new conduct of the defendants, namely their presentation of evidence during Scott's contempt hearing, the Court **FINDS** that Scott added these claims in bad faith and for the sole purpose of harassing the defendants. Accordingly, the Court **FINDS** that the present action constitutes frivolous and vexatious litigation.

Because of the frivolous and vexatious nature of *Scott XIII* and because claim preclusion bars Scott from reasserting these claims, the Court **DISMISSES Scott XIII** with prejudice. Scott's motion to remand is **MOOT**.

Scott is **ADVISED** that the Court views his filing claims stemming from the same facts and issues previously litigated in federal court as contumacious behavior. However, because Scott is currently serving six months probation for contempt of court on a related matter, *Scott X* (2:98cv180), the Court shall, at this time, withhold ruling on whether sanctions should be imposed.

Scott is further **ADVISED** that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this order.

The Clerk is **DIRECTED** to send a copy of this order to Plaintiff and to all counsel of record.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 7, 2000

RESPONDENTS' APPENDIX H

SCOTT XIII JUDGMENT ORDER

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Norfolk Division

FILED
April 7, 2000

MICHAEL A. SCOTT,

Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION, et al.

Defendant.

JUDGMENT IN CIVIL CASE
Case number: 2:99CV1814

[X] **Decision by Court.** This action came for decision before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that because of the frivolous and vexatious nature of this complaint and because claim preclusion bars plaintiff from reasserting these claims this action is **DISMISSED** with prejudice.

April 7, 2000
Date

Norman H. Meyer, Jr.
Clerk

/s/ Betty E. Baynes
(By) Betty E. Baynes
Deputy Clerk

RESPONDENTS' APPENDIX I

SCOTT XIII APPEAL BOND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED
May 18, 2000

MICHAEL A. SCOTT, *pro se*,

Plaintiff,

Civil Action No. 2:99cv 1814

v.

NORFOLK SOUTHERN CORPORATION, et al.,

Defendants.

ORDER REQUIRING AN APPEAL BOND

On May 4, 2000, Michael A. Scott filed a notice of appeal of the Court's final order in this case. On May 15, 2000, the defendants moved the Court to require that Scott post an appeal bond in the amount of $2,500.00 to ensure payment of the defendants' appellate costs.

Rule 7 of the Federal Rules of Appellate Procedure permits a district court to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." In accordance with this rule, the Court **ORDERS** that Scott file a bond in the amount of $1,000.00 to ensure payment of the defendants' appellate costs.

The Clerk is **DIRECTED** to send a copy of this order to the Plaintiff and to all counsel of record.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
May 17, 2000

RESPONDENTS' APPENDIX J
SCOTT XIII AMENDED APPEAL BOND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

FILED
June 26, 2000

MICHAEL A. SCOTT, *pro se*,

Plaintiff,

v. Civil Action No. 2:99cv1814

NORFOLK SOUTHERN CORPORATION, et al.,

Defendants.

ORDER AMENDING APPEAL BOND ORDER

On May 4, 2000, the Court ordered Michael A. Scott to file a bond in the amount of $1,000.00 to ensure payment of the defendants' appellate costs. The Court **ORDERS** that this Order be amended to require that Scott post the appeal bond or cash or its equivalent in lieu of bond within thirty (30) days of the entry of this Order.

The Clerk is **DIRECTED** to send a copy of this order to the Plaintiff and to all counsel of record.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 23, 2000